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F. M. GOADBY, Esq., D.C.L.

“Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ᾽ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον.’—Arist. *Pol.* II. 1.

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THE IMMUNITIES OF FOREIGN STATES ENGAGED IN PRIVATE TRANSACTIONS.

[*Contributed by* S. H. Brookfield, Esq., M.A., LL.M.]

The idea of the State as a juristic person, capable of possessing rights and incurring liabilities which may call for consideration in the courts of another state, has only come into prominence during the last century, with the growth of the distinction between a state and its sovereign. As late as 1867 doubt existed in England as to whether a foreign state "adopting the republican form of government" might sue in the English courts, though these had always been open to foreign sovereigns.[1] Even now in English textbooks (which are perhaps of more authority in these matters than is generally the case in England with regard to "doctrine") the immunities of foreign states, and of foreign sovereigns and their ambassadors, are generally dealt with together, as if the position were in all respects analogous.

The attitude of the courts in various countries towards the subject has been influenced by their position *vis-à-vis* their own governments. Thus, Belgian courts between the years 1842 and 1917 were evolving a distinction between acts of the Belgian state in its sovereign and in its civil capacity, and it is not surprising to find that they imported this distinction into cases where foreign states were concerned. In England, on the other hand, it has always been a fundamental principle of the law that "the King can do no wrong," and a special kind of remedy by "Petition of Right" has had to be created to give redress in cases of alleged breach of contract by the state or its servants. These facts, and the absence of any conception of the state as a separate juristic personality, have all contributed to establish the rule that foreign sovereign states are immune from the jurisdiction of English courts, unless there is an express submission to the court itself in the particular matter under dispute.

Between the Belgian doctrine of liability to suit, irrespective of any consent, in respect of a whole class of acts which may be called "civil" or "private" transactions as opposed to acts of sovereign power, and the English doctrine which only admits of such liability on the clearest possible evidence of express submission to the jurisdiction, there lies a whole mass of jurisprudence of various countries tending to base jurisdiction on implied submission. This has been largely produced, of recent years, by the activities of governments and governmental agencies in the sphere of world trade—and most of all, perhaps, by the complete governmental monopoly of foreign trade established in Russia by the Union of Socialist Soviet Republics.

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[1] See *The United States of America* v. *Wagner*, (1867) L.R. 2 Ch. App. 582.

The method of this paper will be to take the matters arising in an ordinary suit in their order, to set out the English " jurisprudence " (using this word in the continental sense of decisions of the courts, which owing to the binding nature of judicial precedent in England may be considered as law) and then to mention the divergences therefrom in the jurisprudence and doctrine of other states. No attempt to suggest a uniform international practice will be made. This has been excellently done in the draft Convention on the subject prepared by the Harvard Law School's Research in International Law and published as a Supplement to the *American Journal of International Law* for 1932. The author's personal opinion is, that in spite of the imposing array of cases collected in the notes to this Convention, the subject has not yet received sufficient consideration in many countries to warrant an attempt at codification. This view appears to be also that of M. Matsuda, who completed his Report on the subject to the Committee of Experts appointed by the League of Nations for the progressive codification of international law with the statement that it was difficult to draw conclusions exact and precise enough to serve as a basis for an accord between the nations. It should be understood, however, that this opinion does not extend to the question of the status of public vessels. That an accord is realizable and desirable in this sphere is shown by the Brussels Convention of 1926, which unhappily still lacks the number of ratifications necessary to put it into force. This aspect of the subject—the immunities accorded to public ships—is only treated incidentally and by way of illustration in the following pages.

Inception of a Suit.—The idea of the immunity from suit of foreign governments is generally based in English legal thought upon " the comity of nations," and has at times been confused with diplomatic immunity and the personal immunity accorded to foreign sovereigns. A plaintiff state, if recognized by His Britannic Majesty's Government, is permitted to bring an action in an English court, but it is the duty of the court, if an action is brought *against* a foreign state, to take judicial notice of the sovereign status of the defendant, and to dismiss the case, unless there has been an express submission to the court itself with reference to that particular case. A "general submission," or a submission to the jurisdiction as to other issues, even if arising out of the same facts, is of no avail. In case of doubt as to the sovereign status of a defendant state, the court will refer to the Foreign Office, whose opinion on the subject, if clearly expressed, must be accepted as conclusive. Even a provisional recognition as an independent state is sufficient.[1]

It is in these ideas of the obligation to decline jurisdiction even if the parties raise no objection to the exercise thereof, and in this restricted interpretation of the nature of the consent which is necessary to found jurisdiction, that the main difference lies between the law developed in English cases and the jurisprudence of continental nations.

The leading case in the English courts on the question of submission to the jurisdiction is that of the *Duff Development Co.* v. *The Government of Kelantan.*[2] The facts from which an implied submission to the jurisdiction might have been deduced were in this case of the strongest kind. The Kelantan Government had entered into a contract with the plaintiffs, which contained a clause providing for the submission of disputes under the contract to arbitration under the Arbitration Act, 1889, an Act which contemplates recourse to the courts during or after the arbitration in certain circumstances. In pursuance of this clause, the parties had entered into an arbitration, and an award had been given against the government. The government had then applied to the Chancery Court to set aside the award made, but this application was refused. The plaintiffs then brought an action for leave to enforce it in the same manner as a judgment. The House of Lords, however, eventually held that the government had not submitted to the jurisdiction of the court in the proceedings to enforce the award, either by assenting to the arbitration, or by applying to the court to set aside the award. Lord Dunedin said:

> It is true that the Sultan (the sovereign of Kelantan) contracted to allow the jurisdiction to be exercised against him, but he did so out of court, and now he has changed his mind. He has broken his contract, but the court has no jurisdiction to enforce any performance of it. It seems to me that to say that by agreeing to submit, he did submit, is to argue in a circle.

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[1] See *The Gagara,* [1919] P. 95.

[2] [1924] A.C. 797.

And Lord Sumner added:

> The Sultan's contract to arbitrate . . . is not an undertaking given to the court itself. . . . It is necessary to find something voluntarily done in or towards the court, and to find in what is done something that really evinces an intention to submit.

The only case in which a submission to English courts may be in any way implied or involuntary on the part of a foreign state is where such state appears as plaintiff, and a defence in the nature of a set-off or counterclaim is raised against it. This, however, properly belongs to the realms of mesne process, and will be dealt with later under that heading.

No case has yet arisen in English courts involving title to or possession of land in England, owned by a foreign state, and not covered by diplomatic privilege. It is clear, however, that the courts of the *situs* of an immoveable are the only ones which can render an effective judgment with regard to it, and this, and the almost universal application in private international law of the *lex situs* in such cases, lead naturally to the assumption that another exception to the principle of immunity would be established if such a case came up for decision in England. The American case of *Georgia* v. *Chattanooga* [1] lays down a principle which would probably be followed: "Land acquired by one state in another state is held subject to the laws of the latter, and to all the incidents of private ownership. The proprietary rights of the owning state do not restrict or modify the power of eminent domain of the state wherein the land is situated."

American cases on the general question of submission seem to follow much the same lines as English ones. Although in the leading case on the subject [2] Marshall C.J. said that consent might be express or implied, and in the latter case, though exposed more to the uncertainties of construction, "if understood not less obligatory," later cases have in general insisted on express submission to the court itself. Appearance merely to contest the jurisdiction has, however, sometimes been regarded as a submission; and American courts do not extend immunity to "governmental" corporations in the same way as do the courts of Great Britain and other nations.[3]

Continental nations have not in general adopted such a restricted notion of the nature of the consent necessary to confer jurisdiction on their courts in respect of foreign states. Two main schools of thought can be distinguished in their jurisprudence, and each is supported by a wealth of doctrine: (i) the "Belgian" school, which postulates a liability independent of consent in certain cases, and (ii) the "implied consent" school, which, while preserving the principle of immunity in theory, departs from it in practice by a wide interpretation of the notion of voluntary submission.

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[1] 264 U.S. 472 (1923).

[2] *The Schooner Exchange* v. *McFaddon and Others*, (1812) 7 Cranch's reps. 116.

[3] Compare *Coale* v. *Société Co-operative Suisse des Charbons*, 21 F. (2d) 180, with *Compania Mercantil Argentina* v. *United States Shipping Board*, (1924) 131 L.T. 388.

The first school seems to have but three adherents, Belgium, Italy and Egypt, and of these, one, namely Italy, at times seems inclined to wander into the second, as in the case of *Russian Trade Delegation* v. *Tesini and Malvezzi*.[1] In general, however, it may be said that these three states draw a distinction between "private" acts, or *actes de gestion*, as to which foreign states are justiciable in their courts, and "public" acts, or *actes de pouvoir*, in respect of which a sovereign immunity is recognized. No general criterion for making such a distinction has been laid down in the Belgian or Egyptian decisions, but the Italian courts appear to look to the form or nature of the act rather than to its purpose. Thus, a contract passed between an Italian subject and a foreign state, provided it is otherwise within the jurisdiction of the Italian courts, is not held exempt from such jurisdiction merely because its subject-matter or purpose are plainly shown to be connected with the sovereign functions of such foreign state. To take a specific instance, the purchase of supplies for its army by a foreign state has been held to be a private act.[2] Apparently only where the act complained of is performed in a manner essentially "governmental," namely by requisition, confiscation or capture in time of war, does the immunity operate.[3]

Most of the other nations of continental Europe are to be found, in greater or less degree, in the ranks of the "implied consent" school. That is to say, they justify such jurisdiction as they exercise over foreign countries who have not expressly submitted, on the ground of implied consent, though there are Dutch and French cases where the judges have referred with approval to the doctrine of the Belgian school.[4] The implication of consent is raised by the conduct of the state sued, in connexion either with the transaction which is the subject of the litigation or with the actual proceedings in the courts themselves.

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[1] Foro Italiano, 1925, vol. I, col. 830.

[2] *Stato di Rumania* v. *Trutte*, 1926 Mon. 288.

[3] See, *e.g.*, *Stato di Grecia* v. *Di Capone* (Riv. Dir. Int., vol. 19 (1927), 102).

[4] See, in Holland, *De Unie van Zuid Afrika* v. *Grote* (Nederlandsche Jurisprudentie, 1921, p. 847), and in France, *Lakhowski* v. *Gouvernement Suisse* (Clunet, 1921, p. 179).

Only the barest mention of the main classes of cases where consent has been implied is possible within the limits of this paper. The Harvard Draft Convention, already referred to, which bases itself largely on the existing jurisprudence, states that they arise, or should arise, when a respondent state (*a*) after notification of a proceeding takes any steps relating to the merits in that proceeding before asserting its immunity, or (*b*) by the contract upon which proceedings are based has previously consented to the institution of such a proceeding, or (*c*) by treaty with the state in whose court the proceeding is brought has previously consented to the institution of such proceeding, or (*d*) has previously, by law or regulation, or declaration in force when the claim of the complainant arose, indicated that it would consent to the institution of such a proceeding, or (*e*) engages in the territory of another state in an industrial, commercial, financial or other business enterprise . . . and the proceeding is based upon the conduct of such enterprise.

In cases coming within the first four of these classes continental courts have generally assumed jurisdiction. In connexion with class (*a*), however, it should be noted that an appearance prompted by a desire to get rid of a *saisie conservatoire*, or other form of preventive execution, common in most continental countries though unknown to English or American procedure, is not usually considered as a plea to the merits of the case sufficient to give the court jurisdiction to try it.

In cases of the nature mentioned in class (*e*), there is a great variety of opinion in the jurisprudence of various countries. British and American courts have steadfastly refused to allow any such "implied consent by engaging in commercial transactions" to take the place of the express submission which has already been discussed.[1] French courts have assumed jurisdiction on the basis of such implied consent in cases against Soviet Russia, and in at least one other case.[2] A case in the Greek Court of Appeal at Athens follows the same principle.[3] It may be noted also that the courts of states which only recognize a partial immunity limited to *actes de gestion* frequently base their judgments also on this ground of implied consent by engaging in commercial transactions.[4]

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[1] See, *e.g.*, *The Porto Alexandre*, [1920] P. 30, and *Kingdom of Rumania* v. *Guaranty Trust Coy. of New York*, 250 Fed. 341.

[2] *Etat Roumain* v. *Pascalet et Cie*, 1924, Dalloz Hebd. 260.

[3] See *Themis*, vol. 40, p. 486.

[4] See, *e.g.*, in Italy, *Governo Francese* v. *Serra* (1925, 66 Monitore 777), and in Belgium, *Monnoyer et Bernard* v. *Etat Français* (1927, Pasicrisie Belge 129).

There seems no doubt, from a practical point of view, that the commercial operations of foreign states should be submitted to the jurisdiction of the courts of the state where they are conducted. There is a growing tendency for states to waive their immunity when engaging in commerce by means of declarations or treaties. Thus, the United States of America, though for a time claiming that their Shipping Board was a governmental corporation entitled to sovereign immunities, eventually (on May 5, 1923) notified all other maritime powers that they would not claim that ships operated by or on behalf of the Board, when engaged for commercial purposes, were entitled to immunity. So, too, the U.S.S.R., in various trade treaties, has renounced the sovereign immunity which would otherwise attach to its trade delegations in various countries, which delegations are emanations of the Union itself.

Apart altogether from ideas of consent, or the distinction between *actes de gestion* and *actes de souveraineté*, the courts of most countries assume jurisdiction in actions affecting real property owned or occupied within their borders by foreign states, on the ground that in all such matters the courts of the place where the property is situate have exclusive jurisdiction. This generally recognized rule is only overridden by the existence of diplomatic privilege, such as arises in the case of embassy buildings. Cases on the subject are not very numerous, though with the increased commercial activity of many states they may be expected to become more so. Typical, however, are the French case of *Etat de Suède* v. *Petrochino*,[1] and the Egyptian one of *Kildani* v. *Fisc hellénique*.[2] The latter was a succession case concerning an estate, composed largely of Egyptian lands and mortgages, left by will to the Greek Treasury. The court, in assuming jurisdiction, said:

> Each nation possesses and exercises sole and exclusive sovereignty over the whole of its territory and to remove from it the right of jurisdiction in suits of this nature where foreign governments are parties under colour of respecting their sovereignty would be to violate its own. . . . It may be said that in every country there is unanimity as to the undoubted competence of the courts in all suits concerning immoveables or successions in that country.

The extension of this rule to successions is a subject on which there is little authority save this case, and the opinions from various Foreign Offices and jurists of Europe in the famous *Zappa case*.[3]

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[1] 1930, Dalloz Hebd. 15.

[2] (1912) 2 Gaz. des Tribx Mixtes, p. 161.

[3] Martens, *Treaties*, 2nd Series, vol. 18.

It is to be noted, however, that both the resolutions of the Institut de Droit International passed in 1892 on the subject of Competence, and the Report of M. Matsuda to the League of Nations already referred to, include, among the cases in which it is considered that jurisdiction should be assumed by national courts over foreign states, cases of succession to an estate or legacy which is being administered by such courts, as well as those concerning immoveable property within their territory.

Mesne Process.—Once a state has been properly brought before an English court, it is treated in matters of procedure on exactly the same footing as any other defendant. Like any person residing out of the jurisdiction, it is bound to give security for costs. Its officers are bound to give discovery and answer interrogations in the same way as the officers of a corporation, and proceedings will be stayed until this is done.[1]

Where a state refuses discovery, on the ground that it would involve disclosure of official secrets or documents, it would seem that the court has a discretion as to whether to let the case proceed or not. In an unreported case mentioned in Westlake's *Private International Law*,[2] the court ordered the government of Soviet Russia to furnish certain statements on oath. On objection that the officers of that government were prohibited by Russian law from making statements on oath, the court stayed the proceedings, in which the government were plaintiffs, until such time as the statements were filed. Nevertheless, it is submitted that as the court undoubtedly recognizes the existence of grounds of public policy making impossible the production of British state documents or evidence on matters of state, it would be prepared to allow a similar plea by a foreign state, and would not stay an action in such circumstances for non-production of evidence, unless satisfied that justice could not be done without its production.

The practice of other states seems also to be to treat states subject to their jurisdiction in the same way as other foreigners or foreign corporations. Thus, in a Polish case,[3] it was held that the plaintiff state must submit to a special defence open to the defendant, even though this involved appearing as defendant in what was technically a separate suit. In *Republic of Honduras* v. *Soto*,[4] the independent state of Honduras was ordered by the New York Court of Appeals to give security for costs, in the same way as a foreign corporation would be required to do under American law, while in the French case of *Le Navire Western Wave,*[1] the United States Shipping Board was similarly ordered to furnish a *cautio judicatum solvi* in spite of the plea, accepted by the court, that it was an emanation of the United States government.

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[1] *Rothschild* v. *The Queen of Portugal*, (1839) 3 Y. & C. Exch. 594.

[2] 7th ed., p. 273.

[3] *Commercial Representation of the U.S.S.R.* v. *Maurycy Fayans*, Supreme Court, 1928.

[4] 112 N.Y. 310.

Where a foreign state submits to the jurisdiction of a national court by bringing a suit, the court has often to decide how far a counterclaim against that state can be admitted. The English law on the subject is contained in the cases of *Strousberg* v. *The Republic of Costa Rica,*[2] *The Newbattle,*[3] *South African Republic* v. *Compagnie Franco-Belge du Chemin de Fer du Nord,*[4] and *Union of Soviet Republics* v. *Belaiew.*[5] To be admissible, such a counterclaim must be confined to matters immediately connected with the claim, and must be of such a nature that complete justice cannot be done between the parties without considering it. Where these two requirements are fulfilled, it would seem that a counterclaim may be maintained in an English court even if the result of judgment for the defendant on the counterclaim may be to order the plaintiff state to satisfy a pecuniary claim. This, at all events, seems a logical deduction from the case of *The Newbattle.* Here the Belgian state brought an action for damages arising out of a collision between *The Newbattle* and a Belgian public ship. The owners of the former ship counterclaimed for their damages in the same collision, but were unable to arrest the Belgian ship owing to her immunity. The court held that the plaintiffs must give security not only for costs, but also for the amount of the counterclaim. Though the property of the Belgian state could not be seized, yet that state, coming as a suitor to an English court, was bound to afford to the defendant similar facilities in his defence to those which would have been open to him if the plaintiff had been a private individual.

In the other three cases cited, it was held that the counterclaim was not sufficiently connected with the matters in issue in the claim to be admissible. In the last of them, an action for the delivery up of documents, the defendant endeavoured to show a lien for costs being incurred by him in the same capacity as that in which he held the documents, and which arose out of matters to which these documents related. It was held, however, that the indemnity claimed by him was not in respect of any liability incurred by him acting as *custodian* of the documents, and the counterclaim therefore failed. This case was probably only just on the wrong side of the line.

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[1] 1921, 2 Gaz. Pal. 112.
[2] 29 W.R. 125.
[3] L.R. 10 P.D. 33.
[4] [1898] 1 Ch. 190.
[5] (1925) 134 L.T. 64.

In other countries, opinions vary as to whether judgment on a counterclaim against a foreign state should be allowed to take an affirmative form—*i.e.* whether the plaintiff state may be ordered to pay moneys to the defendant if the counterclaim is successful and is for an amount greater than the claim, or whether the submission to the counterclaim is only in so far as it may avail to defeat the plaintiff's demands. In favour of the first alternative are judgments in America (*Kingdom of Norway* v. *Federal Sugar Refining Co.*),[1] in France (*Letort* v. *Gouvernement Ottoman*)[2] and Germany (*Portugesischer Staat* v. *Deutches Reich*),[3] as well as Italy and Belgium. On the other hand, Dutch courts in the case of *De Belgische Staat* v. *De Badts* [4] have held that an affirmative judgment against a state cannot be given on a counterclaim. The American case of *Republic of France* v. *Inland Navigation Co.*[5] is to the same effect, and it was also said in *Republic of France* v. *Pittsburg Steel Export Co.*[6] that " while in the circumstances of this case the defendant might set up a counterclaim which arose out of the same transaction declared on in the complaint, and then only to the extent necessary to defeat it, an affirmative judgment against the plaintiff may not be rendered without its consent." The judgment in this last case, however, proceeded on the lines that the facts out of which the counterclaim arose were not sufficiently connected with the action.

In this connexion it should be noted that the courts of those countries which still hold to the theory of total immunity apart from consent (*i.e.* " the implied consent school ") generally require a close nexus to be established between claim and counterclaim before they will assume jurisdiction. Thus, in the case of *Von Hellfeld* v. *Fiskus des russischen Reiches*,[7] it was stated that :

> By bringing an action as plaintiff in the local courts of another state, a foreign state does not make itself amenable *ipso facto* to every counterclaim which is maintainable according to the law of the jurisdiction sued in. Such a submission may be inquired into when and in so far as the counterclaim is solely a defence to the claim. But in cases where counterclaims of the defendant are independently sued on, the admissibility

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[1] 286 Fed. 188.

[2] 5 Rev. Jud. Int. de la locomotion aérienne 142.

[3] Reichsgericht 1925.

[4] Weekblad van het Recht 1923, No. 10978.

[5] 263 Fed. 410.

[6] 112 Misc. (N.Y.) 688.

[7] 20 Zeitschrift für Int. Recht (1910).

of the right of action on the counterclaim must be judged not otherwise than if the counterclaim had been asserted in an independent action.

Enforcement of Judgments.—In English law, not only must there be express submission to the court itself in order to found jurisdiction, but a fresh consent is necessary before execution can be levied against the goods of a foreign state. In the case of *Duff Development Co.* v. *Kelantan Government*,[1] the plaintiff company was seeking to attach a debt due to the defendant government from a third party, in part satisfaction of an order for the payment of costs, made in a suit in which the government itself had been the plaintiff, and thus expressly submitted to the jurisdiction of the court. Russell J. dismissed the application, and the Court of Appeal confirmed his decision.

> Judgment and execution [it was said in this case] are two different things. . . . The initial submission to the jurisdiction does not preclude the sovereign state from now invoking that international comity which induces this country to decline to exercise by means of its courts any of its territorial jurisdiction over the property of a sovereign state within its territory.[2]

The House of Lords, in a subsequent appeal on this and other points in the case, found it unnecessary to consider this particular question, and though Lord Dunedin expressed his disapproval of the Court of Appeal's decision on the point,[3] Lord Sumner said that he did not doubt the reasoning contained in the judgments.[4] Thus the law at the moment is that a further express submission to execution is required, and it seems unlikely that their Lordships will hold the contrary view if the point should come before them again in a form calling for definite decision.

The case of *Vavasseur* v. *Krupp*[5] shows also that the court has no jurisdiction to prevent a foreign sovereign (the decision obviously would apply to foreign states also) from removing his property from the country even if there has been a submission to the jurisdiction of the court by appearing as defendant. In this case an injunction had been granted against the agents of the Mikado of Japan, restraining them from shipping out of England shells which were the property of the Mikado, and which, according to the plaintiff, infringed his patent rights. The Mikado intervened to claim property in the shells and to request that he should be allowed to remove them notwithstanding the injunction. His appearance was merely to assert his title, and to protect his agents from possible claims for breach of the injunction. His request was granted, and Cotton L.J. said: " Even if the Mikado had brought himself into court as an ordinary defendant, that, in my opinion, would not give the court jurisdiction as against the subject-matter, namely, jurisdiction to interfere with the public property of Japan, which is represented here by the Mikado."

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[1] [1923] 1 Ch. 285.

[2] Per Russell J. at p. 400.

[3] See [1924] A.C. at p. 821.

[4] *Ibid.* at p. 830.

[5] (1878) 9 Ch. Div. 351.

The practice of most other states seems also to be in favour of requiring some form of consent by the respondent state over and above the consent given (where necessary) to the institution of the suit, before execution can be enforced against its goods. Thus, Belgian courts, though assuming jurisdiction in the case of *actes de gestion* apart from any consent by a respondent state, will not execute judgments against the property of a foreign state without such consent, holding it to be *insaisissable*. In the case of *Bartin* v. *République hellénique*,[1] funds which had been deposited with a Belgian company, which was doing work for the Greek government, were attached under a *saisie-arrêt* to secure damages claimed by the plaintiff from the Greek government. The court held that the government were not liable to damages for the act complained of, which was an *acte de pouvoir*, and also held that, even if they had been, a *saisie-arrêt* on funds belonging to them could not have been confirmed without their consent. Similarly, in *Etat Portugais* v. *Sauvage*,[2] it was said that Belgian legislation did not allow of execution against the Belgian state, and that, therefore, in accordance with the principle of equality of states, this immunity ought to be accorded to other states, at any rate if they themselves admitted the principle of the *insaisissabilité* of goods belonging to the state. The same argument was used in the French case of *Lloyd Brésilien* v. *Cie Chargeurs Réunis*,[3] following earlier French decisions. In the American case of *Dexter and Carpenter* v. *Kunlig Jarnvagsstyrelsen*[4] it was held that " consenting to be sued does not give consent to a seizure or attachment of the property of a sovereign government," and leave to issue execution was refused.

The rules as to the nature of the consent required vary in different countries, in the same way as those as to waiver of immunity from suit. Thus, in Germany, the deposit of cash and securities in the Deutsche Bank as security for payment of sums due under contracts entered into by the Turkish government with German nationals was held to be a submission of such funds to execution following legal proceedings under those contracts.[1] On the other hand, in the case of *Von Hellfeld* v. *Fiskus des russischen Reiches*,[2] where it was sought to seize property of the Russian state on a judgment rendered against it on a counterclaim, it was held unnecessary to decide whether the Russian government had submitted to the jurisdiction of the court with regard to the counterclaim, since, in any event, such submission, even if established, would not be tantamount to a submission to measures in execution of the judgment.

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[1] La Belge Judiciaire, 1932.

[2] (1922) Pasicrisie Belge 2.53.

[3] (1919) 46 Journ. du dr. int. 747.

[4] 51 Sup. Ct. 181.

It should be noted that in the first of the above cases the deposits had been made expressly as security for the due performance of the contracts, on account of the non-performance of which they were attached. As was said in the judgment, the subjecting of these funds to execution by German courts resulted in nothing else than the fulfilment of the purpose of these funds. Having regard to this, the court had good ground for assuming an implied submission, which in fact it did. There were no such grounds in the Belgian case of *Bartin* v. *République hellénique*, previously cited, where the funds sought to be attached had been deposited in respect of quite different transactions.

In Czecho-Slovakia, the Supreme Court has held that it had jurisdiction, not only to decide on the title to land within its boundaries owned by a foreign state, but to levy execution against such property in pursuance of its judgment. It is true that the property was afterwards found to be entitled to diplomatic privilege, and the execution proceedings were annulled, but the case is significant as being one of the very few where the execution of judgment against land owned by a foreign state has been considered. It is submitted that as a state is generally liable to suit in respect of such property in the courts of the *situs* without the necessity for consent, so execution of a judgment obtained in such a suit should be executable against the property independent of consent.

Apart from this Czecho-Slovakian case of execution against land, the courts of Italy and Egypt appear to be the only ones which have permitted execution against the property of a foreign state without its consent. There is not much jurisprudence on this part of the subject in Egypt, the only case being that of *Monopolie des Tabacs de*

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[1] *X.* v. *Kaiserlich Turkischen Militarfiskus* (Juristische Wochenschrift L. 1921, II. 773.

[2] 20 Zeitschrift für Int. Recht (1910) 416.

Turquie v. *Régie Co-intéressée des Tabacs de Turquie.*[1] Here it was said that once the principle of the distinction between *actes de pouvoir* and *actes de gestion* was admitted, and the state treated as a private individual in respect of the latter, there was no reason why execution should not be permitted against property which the state held in the same capacity. In point of fact, no measures of execution against Turkish property were necessary, the creditor having in his own hands funds of the Turkish government of an amount greater than the claim, but apparently the courts were prepared to allow the seizure of tobacco in bond, belonging to the defendant government, and in fact any property of theirs used for a commercial purpose.

Italian courts have consistently maintained their right to issue execution against what has been termed " patrimonial property " of a defendant state without its consent, at any rate since 1887.[2] A Decree of July 15, 1926, now provides that no execution against property of a foreign state can be issued without the consent of the Minister of Justice, and has the effect of allowing cases likely to cause resentment to be dealt with diplomatically. In theory, however, the denial of the right to immunity persists. No really satisfactory definition of the property which may be taken in execution has been framed. It does not include funds intended for public use, or funds derived from taxation, but " when funds or revenue of a private nature belonging to a state are involved, in other words, funds private and alienable to which the provisions of the Civil Code relating to the mode of acquisition, transfer and enjoyment of property are applicable . . . attachment has been freely permitted, irrespective of the circumstance that such funds are carried on the account of the state, it being impossible that the state should be exempt from the payment of its own debts."[3] It is submitted that such a distinction is unreal, and almost impossible to maintain in practice, and that the only satisfactory attitude is that of the great majority of states, which refuse to issue execution altogether except with the consent of the defendant state, or perhaps in cases involving land or immoveables.

Conclusion.—In conclusion, the convention prepared by M. André Prudhomme for the International Law Association and adopted at their meeting in 1926 deserves notice, as suggesting a practical method of procedure in dealing with the difficult and delicate questions which arise in these cases. He suggests that in the first instance, all such cases, whether concerned with *actes de gestion* or *actes de pouvoir*, should be submitted to the national courts of states to be decided according to their national laws, and that there should be a choice of appeal open to the unsuccessful party, either to a higher tribunal of the same state or to a special tribunal composed of a judge of the nationality of each party, two from other states, and a President. The adoption of a Convention on some such lines as this would have many advantages, the most important being the removal of such disputes altogether from the diplomatic sphere, to which they do not belong, and the gradual accumulation of a body of truly authoritative international jurisprudence on the subject.

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[1] 42 Bulletin des Tribunaux Mixtes 212.

[2] *Hamspohn* v. *Bey of Tunis* (1887, 12 Foro 474).

[3] See the case last cited.

THE RECOGNITION OF NATIVE LAW AND CUSTOM IN BRITISH AFRICA.

[*Contributed by* JULIUS LEWIN, ESQ., *of the Middle Temple, Barrister-at-Law, Advocate of the Supreme Court of South Africa.*]

OF all the regular phrases used in the discussion of African affairs, "native law and custom" is perhaps the commonest. It is now an explicit part of British policy to retain indigenous institutions in Africa and even to avoid tampering with them where it is not strictly necessary to do so in the interests of law and order. This was indeed the policy laid down long ago for lawyers and judges, who have always been guided by a statutory provision to the effect that in civil cases to which natives are parties they should apply native law and custom "so far as it is not repugnant to natural justice and morality."[1]

As this avowed intention to respect native law and custom has been on record for more than fifty years, one might expect to find a certain amount of accurate information about the actual content of native law. But the subject has been badly neglected, and the fact that the literature is so meagre makes it more difficult to discover how the injunction to apply native law except where it is repugnant to natural justice has worked in practice.

Conflict of European Law and Native Custom.—The conflict of European law and native custom,[2] which has been considered by other colonial powers and notably and most thoroughly by the Dutch in relation to the Netherlands East Indies, does not yet seem to have been recognized in England as an important issue. Nevertheless, the law reports from British dependencies in Africa and from the Union of South Africa show that the problem does arise from time to time and must be solved in legal terms, although no doubt circumstances much more frequently impose immediate solutions for which the sanction of the law is never asked by the parties concerned. To the situation in Africa the words of Professor Kollewijn apply :

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[1] *E.g.* Nigeria and the Gold Coast Supreme Court Ordinance, 1876, s. 19; Transvaal Law No. 4 of 1885; Southern Rhodesia Order in Council, 1898, s. 50; Kenya Order in Council, 1921, s. 7; South African Native Administration Act, No. 38, 1927, s. 11. The application of native law has been held to be permissive, not imperative. See *Cole* v. *Cole*, 1898, Law Reports of Nigeria, vol. i, p. 21; *Komo and Leboho* v. *Holmes*, N.O., 1935, S. Rhodesia, 86; *Nqanoyi's case*, 1930, Native Appeal Court (Cape), vol. ii, p. 18. But cf. *Vela* v. *Mandinika and Magutsa*, 1936, S. Rhodesia, 171.

[2] The usual phrase "native law and custom" will hereafter be abbreviated for the sake of clarity to "native custom."

> Daily the European buys from the native, daily he makes use of his services and labour both inside and outside the home, in the office, on the estate and in connexion with his transport ; and yet in these matters judgments are scarce as long as land and houses are not involved. On the one hand, this is due to the fact that the amounts concerned are so small that they would not warrant the expense of a lawsuit, and on the other because, when larger amounts are involved, use is made of a means that is encountered in many colonies where the European law of contract is not applicable, *i.e.* the right of the native party to choose the European civil law in respect of a certain transaction. The European often makes this voluntary submission one of the conditions of the contract, if it is at all important, so that the inter-racial conflict is nipped in the bud.[1]

This situation was foreseen in West Africa, where the recognition of native law was from the beginning qualified by the proviso that " no party shall be entitled to claim the benefit of any local law or custom if it shall appear either from the express contract or from the nature of the transaction that he agreed that his obligations should be regulated exclusively by English law." [2]

The demands of European merchants and traders anxious to own the land on which they build factories and warehouses have also introduced English legal ideas, a process encouraged by the tendency of African lawyers trained in England to use English terms in conveyancing and other documents. " This conflict between the English law of real property and the customary native tenure has become very acute in Lagos and has given rise to cases of extreme difficulty and hardship. It suggests that the Legislature may before long decide that, within the township of Lagos at least, the time has come to sweep away the whole system of native tenure of land." [3]

The law as applied by superior courts is therefore likely to be invoked in only a very small proportion of cases. But while this fact may be significant for students of native administration, it cannot release legal practitioners from the obligation to consider the problems involved.

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[1] R. D. Kollewijn, " Inter-Racial Private Law " in *The Effect of Western Influence on Native Civilizations in the Malay Archipelago.* Edited by B. Schrieke (1929).

[2] Nigeria and the Gold Coast Supreme Court Ordinance, 1876.

[3] Tew J., in *Brimah Balogun and Scottish Nigeria Mortgage and Trust Co.* v. *Saka Chief Oshodi*, Law Reports of Nigeria, vol. x, p. 36 (1933) ; cf. *Lewis* v. *Bankole*, vol. i, p. 82 (1909).

Recognition of a Custom as Law.—The first question for the court to decide is the existence of the custom alleged to govern the issue or perhaps indirectly relevant to the proceedings. It is submitted that in the absence of previous decisions on the point and of authoritative textbooks to guide the court, the procedure must be that normally followed in English courts before a custom can be recognized as law, that is, it must satisfy the following tests :[1] (i) It must have continued without interruption for as long a period as living testimony can cover ; (ii) it must be certain and definite in its incidence ; (iii) it must be limited either to a locality or in respect of the class of persons affected or in its nature ; and (iv) it must be reasonable.[2]

The first three tests involve questions of fact, but the fourth is a question of law which also introduces the element of conflict between European and native ideas of what is right and proper, and which will therefore be dealt with subsequently. With the first two tests may be coupled a prior question as to the nature of a custom, which might also be disputed.

Ascertainment of Facts.—In its task of finding the facts, the court may be guided in three distinct ways. Firstly, it may by statute receive the assistance of native assessors who advise it on questions which may arise as to the customs of any tribe, and whose opinion is substantially on the same footing as the evidence of an expert witness.[3] Secondly, it would welcome the evidence of an expert witness, of which the best type would be a competent anthropologist at work among the tribe concerned. The obvious advantage of such evidence, which is all too rarely available, is that it would be disinterested. For even a Chief may misrepresent the custom of his people, especially where some interest of his own is at stake, and if the court suspects him of doing so it will be justified in rejecting his view of the alleged custom.[1] Thirdly, the court may be bound to give effect to a rigid code of native law established by statute, though happily it is seldom in this position.[2]

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[1] In the matter of the proof necessary to establish a valid custom there is no substantial difference between English law and the Roman-Dutch law which prevails in Southern Rhodesia and in the Union of South Africa.—*van Breda* v. *Jacobs*, 1921, Appellate Division (South Africa), p. 330. Where native custom itself prescribes a different method of proving an alleged custom, it could be observed. It would probably take the form of recognizing a code consisting of an authoritative collection of customary laws : *e.g.* " The Laws of Lerothodi " in Basutoland ; see Cmd. 4907 (1935), para. 43. Such a code is either judicially noticed or at least accepted as *prima facie* evidence of a custom. Cf. C. K. Allen, *Law in the Making* (2nd ed., 1930), p. 374.

[2] Halsbury's *Laws of England*, 2nd ed., 1933, vol. x, pp. 2–22. Cf. " The Local Ambit of a Custom," by H. E. Salt, in *Cambridge Legal Essays* (1926) ; C. K. Allen, *op. cit.*, pp. 87–108.

[3] *R.* v. *Mutiwiwa*, L.R. Court of Appeal for Eastern Africa, 1935, p. 66. The Nyasaland High Court Practice and Procedure Ordinance, 1906 (s. 16), gives the court power to call native chiefs or others as " referees " on native law in civil proceedings. " The court shall presume the correctness of such evidence."

None of these three means of ascertaining native custom is incompatible with either of the others, and no doubt due weight would also be given to the evidence of Europeans who are specially qualified to express an opinion by their familiarity with local conditions or for any other good reason.

It is submitted that the requirement that a custom must be limited to a particular locality does not necessarily apply to native customs in Africa. In England a custom cannot be alleged to exist throughout the country because it would then be part of the Common Law. But in Africa it is conceivable that a widespread custom such as bride-price might exist throughout the colony and yet have to be proved to the satisfaction of the court.[3] This hypothetical difficulty is due to the fact that a beginning has hardly been made, except in South Africa, in recording what amounts to the native common law.

Such a contingency would, however, be remote, at least where the decisions in earlier cases were properly reported. For having once or twice recognized a custom, the court may subsequently take judicial notice of it, but it should be noted that in doing so the judge is relying not on his own knowledge of the custom but on the fact that it had been previously established by satisfactory evidence. If reliable records of such decisions were kept, an increasing number of native customs would in the course of time be accepted as settled law. That this is the proper way to recognize native custom in British courts has recently been clearly laid down by the Judicial Committee of the Privy Council :

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[1] *Hermansberg Mission Society* v. *Commissioner for Native Affairs and Darius Mogalie*, 1906, Transvaal Supreme Court, p. 135; *Lewis* v. *Bankole*, Law Reports of Nigeria, vol. i, p. 82 (1909); *Visram* v. *Gwanombi*, East African Law Reports, vol. vi (1915–16), p. 31, where "the sole question is whether the Jibana have correctly stated their custom" that there is no individual ownership of land and that no land can be alienated.

[2] Native law has been codified in Natal. The original Code, contained in Natal Law No. 19 of 1891, was revised by Union Proclamation No. 168 of 1932. See W. G. Stafford, *Native Law as Practised in Natal* (Johannesburg, 1935).

[3] Unless one can assume that a custom affecting all the inhabitants would be so notorious as to secure judicial notice on the first occasion it arises.

> The material customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them. Their Lordships have not been informed of any customary law so established ; and they may observe that it would be very convenient if the courts in West Africa in suitable cases would rule as to the native customs of which they think it proper to take judicial notice, specifying, of course, the tribes (or districts) concerned and taking steps to see that these rulings are reported in a readily accessible form.[1]

There remains the further question how far a judge or magistrate can rely on his own knowledge of native custom. In South Africa a distinction has been drawn between technical knowledge of native law and general knowledge of native habits acquired through long experience. It has been held that a judge is entitled to rely on the latter, but any particular fact relevant to the case should be properly proved.[2]

In the dependencies where " indirect rule " has been established, the British court will often be relieved of the task of finding the facts by the decision of a native tribunal which acts as a court of first instance. Its finding on a question of fact " in a case where the circumstances are not very complex and where there is no reason to suppose that the tribunal is unduly swayed by a bias in favour of or a prejudice against either party, is necessarily entitled to considerable respect ; and this is all the more so where native customs are involved, where the language used by the witnesses may involve meanings which it is difficult for the translator to render in English and where the weight to be attributed to the various statements and even the acts of the parties may depend in part on native habits and ideas." [3] Where a question of law is involved, however, a native tribunal, unlike a British court, need not hear evidence as to native law and custom, which it is presumed to know, though of course it may do so when in doubt. But where an appeal lies from a native tribunal to a British court, the appellant would be entitled to place evidence before the higher authority in support of his contention as to what the law and custom is.[1]

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[1] *Amissah* v. *Krabah*, P.C. Appeal No. 136 of 1931, delivered March 3, 1936.

[2] *Ngcobo* v. *Ngcobo*, 1929, A.D. 233 ; *Rowe* v. *Assistant Magistrate, Pretoria*, 1925, T.P.D. 361. Cf. *Report of the Commission on Criminal Justice in East Africa*, 1934, Cmd. 4623, para. 48–51.

[3] *Appeatu* v. *Ohene Kojo Sintim*, P.C. Appeal No. 39 of 1935. The native tribunal consisted of some twenty-six native chiefs and others, of whom seven were " linguists," and the trial of the action lasted eight days.

Natural Justice.—When the facts about a custom have been established, there remains the question of law whether it is "reasonable." With this question may be coupled the application of the legislative proviso that a valid custom must not be "repugnant to natural justice."[2]

The meaning of natural justice[3] can be conveniently considered under three aspects, namely, judicial procedure, content of substantive law and degree of punishment, but only the first is considered here.

In regard to procedure, natural justice has frequently been defined by the courts when they insist that the proceedings of administrative tribunals and of voluntary associations must conform to it. A recent commission on which several eminent lawyers served summarized the law on the subject by stating the following three fundamental principles of natural justice:[4]

(i) A man may not be a judge in his own cause. The mind of the judge ought to be free to decide on purely judicial grounds and should not be directly or indirectly influenced by, or exposed to the influence of, either motives of self-interest or opinions about policy or any other considerations not relevant to the issue.

(ii) The second principle is twofold. No party ought to be condemned unheard; and if his right to be heard is to be a reality, he must know in good time the case which he has to meet. But on neither branch of this principle can any particular procedure (*a*) by which the party is informed of the case which he has to meet, or (*b*) by which his evidence and argument are "heard," be regarded as fundamental. There is, for instance, no natural right to an oral hearing.

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[1] Per Greenberg J., in *Rowe's case, supra.*

[2] The test of reasonableness and the idea of natural justice are related in the closest way historically, having both descended from the ancient doctrine of the Law of Nature. See W. A. Robson, *Civilization and the Growth of Law* (1935), p. 231, and Sir F. Pollock, *Essays in the Law* (1922), pp. 57 ff.

[3] There seems to be a lack of authority in regard to the general meaning of the term apart from its application to a particular custom. In *Tabitha Chiduku* v. *Chidano*, 1922, S. Rhodesia, p. 55, it was held that the words "repugnant to natural justice and morality should only apply to such customs as inherently impress us with some abhorrence or are obviously immoral in their incidence."

[4] *Report of the Committee on Ministers' Powers*, Cmd. 4060 (1932), pp. 71–80. The Commission remarks that these principles are "implicit in the rule of law. Their observance is demanded by our national sense of justice." Cf. W. A. Robson, *Justice and Administrative Law* (1928).

(iii) When further proceedings are open to a disappointed party, he is entitled to know the reason for or grounds of the decision.[1]

These principles were indeed recognized, however vaguely, in the Memorandum issued by a distinguished Colonial Governor, Sir Donald Cameron, for the guidance of the administrative officers under him who are charged with the supervision of native courts :

> . . . There is, of course, much which native courts may copy with advantage from British courts : for example, the hearing of cases in a dignified and orderly manner and in public, the incorruptibility of magistrates and judges, the even-handed application of the law without fear or favour to all alike, and so on, and of these things, which are as it were practical demonstrations of the advice which is constantly being given to them by Administrative Officers, they will feel the influence as time goes on to an increasing extent. These are indeed the very foundations of justice and of law, and no institutions which neglect them can endure : they are general principles of conduct and as such worthy of emulation by native courts, but they must be distinguished from rules of particular application which have been evolved in our law because they are suited to our circumstances and are accepted by us, but which, however excellent, are foreign to Bantu institutions and customs and incomprehensible to the people.[2]
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> . . . It is desirable to induce Chiefs to cause (the judgment) to contain a short account of the reasons for the decision, and of the law on which it is based, at least in cases of importance, for information of great value to the student of native law should thereby be accumulated in the course of years ; but even this consideration must give way before the paramount necessity of avoiding issuing any instructions compliance with which would be beyond the capacity of the court, or such as may tend to create rules of procedure or law in conflict with the customs of the people and incomprehensible to their Chiefs.[3]
>
> Native courts which exercise appellate jurisdiction, however, should, if possible, cause their judgments to be recorded in rather more detail, including, wherever possible, some explanation of the law or custom by which they have been guided.[4]

Chiefs and other members of the courts must not take part in proceedings to which they are themselves parties, and any case in which this has occurred must be quashed as a matter of course.[1]

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[1] There is a doubtful fourth principle to the effect that parties affected by a quasi-judicial decision are entitled to have access to the report, submitted as a result of public inquiry, on which the decision is based. But this principle is applicable only to circumstances which are not likely to occur in the field here considered.

[2] Tanganyika Territory : *Native Administration Memoranda* No. II, Native Courts (2nd ed., 1930), p. 3.

[3] *Ibid.*, para. 15.

[4] *Ibid.*, para. 17.

Finally, it may be noted that enforcement of the principles of natural justice affecting procedure may be complicated by political considerations where, as in South Africa, the Governor-General, having assumed the powers of Supreme Chief and purporting to exercise them according to native custom, removes a rebellious native from his tribe or deposes a Chief without trial or investigation. The decisions holding such action to be not contrary to natural justice are no doubt due to the reluctance of the court to exercise a judicial review of native policy.[2]

[1] Tanganyika Territory: *Native Administration Memoranda* No. II, Native Courts (2nd ed., 1930), para. 34. The Northern Rhodesia Annual Report on Native Affairs for 1935 (p. 49), in discussing the work of native courts, mentions the case of a Chief who " rather spoilt his reputation by hearing a case for divorce in which he himself was the defendant, and divorcing the woman."

[2] *Mokhatle* v. *Union Government*, 1926, A.D. 71 ; and *Mathibe* v. *Lieutenant-Governor*, 1907, Transvaal Supreme Court, p. 557. Cf. *Molusi* v. *Matlaba*, 1920, Transvaal Provincial Division, p. 389, where a custom which allowed a Chief to seize property of a defaulting tribesman worth more than the amount of the tribal levy imposed was held to be contrary to natural justice.

MINERAL, NOT MINING, LAWS IN THE BRITISH EMPIRE.

[*Contributed by* Sir Thomas H. Holland, K.C.S.I., K.C.I.E., D.L., F.R.S.]

Until 1934, mineral rights in the United Kingdom mostly belonged to persons other than the State, the Courts of Justice having decided by a well-known test case in 1568 that only the "royal" metals, gold and silver, belonged to the Crown. In this respect the law in this country has differed from that which prevails throughout most parts of the British Empire.

By the Petroleum Production Act of 1934, however, the property in natural mineral oil in Great Britain was vested in the Crown, and legislation was soon after initiated to purchase the rights for other minerals, of which coal, with an estimated royalty value of about £65½ millions, is by far the most important.

In most other parts of the British Empire the minerals belong in the main to the State, either reserved from the beginning or, as in New South Wales, taken over in part by subsequent legislation. The experience so gathered by each Government in the grant of mining "concessions" in lands overseas will thus be of value to the new organizations set up in Great Britain for similar purposes. And most opportunely, therefore, the Mineral Resources Department of the Imperial Institute has recently collected and published in compact form authoritative information from the Governments of the Dominions, India, the Colonies and Mandated Territories.[1]

There is a fundamental difference between the State ownership of mineral rights and the State control of actual mining operations, although some politicians profess to see mere differences in depth of the pink colour of the labels given to these two distinct policies. With the nationalization of mines we have nothing here to do; it is only regarding the policy of dealing with mineral rights that this note is concerned.

Minerals are of vital importance to the State; and because they form a wasting asset by mining, their wise conservation is a matter of permanent concern to the whole State, not only to the individual who owns them. Unlike vegetable products, minerals cannot be reproduced; they are used once and once only in the history of the country. The ill-effects of bad farming can be remedied, but there are no fertilizers for worked-out mines.

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[1] *Mining Royalties and Rents in the British Empire*, 1936. Royal 8vo., pp. iii + 184. 3*s*. 6*d*.

Yet it is better for a country that its minerals should be worked than that they should be left lying idle in the ground. The problem before the State as mineral owner, therefore, is to formulate conditions for the grant of concessions which will ensure a fair return to the nation and yet will be liberal enough, stable long enough and uniform in rate sufficient to attract from private sources the capital required to carry on the work of exploitation by mining operations.

No more striking example could be found of the importance of finding a judicious mean between two unprofitable extremes. In an industrial country, capable of absorbing the minerals locally produced, the conditions for mineral exploitation may remain nearly constant for long periods ; but in a country in which few industries exist but where they are being developed, the judicious mean chosen and prescribed in the basic rules requires adjustment to secure at a later stage a larger share of revenue for the State.

A mining lease thus includes a provision for renewal at the end of the first term, with a possible increase in the rate of royalty that may be as much as twice the original rate. Obviously, without some such provision for renewal, the miner will endeavour to recover the whole of his capital within the term of his lease, and may be forced to " skim the cream " of the deposit that his lease permits him to exploit.

The grant of an area that is unnecessarily large would result in neglect to work the deposit to its full extent ; an area that is too small may prevent the planning of operations on a scale that would result in economical organization. In the case of ores of the base metals, restriction of the area leased may inhibit the local installation of smelting operations ; yet obviously it is better for the country as a whole that its ores should be smelted within it. The profits of the smelter are thus retained and partly spent locally on labour and stores ; the by-products are turned to account in accessory industries, and the products of these, like the metals which form the principal product, are thus available to meet the demands of various arts—Arts of Peace as well as Arts of War—without the expensive necessity of importation from abroad. Chemical and metallurgical industries are gregarious in their habits. And without them a nation cannot be prosperous in peace time or able to resist attack during war.

A mineral like coal, which is placed on the market for consumption mainly in its raw state, maintains its pit-head value for relatively long periods. But the ores of the base metals, like those of copper, lead, tin and zinc, when mined in an area far distant from smelting centres, may increase in local value many times, when the development of new local industries justifies the establishment of smelting works within or near the mining fields.

Thus, to determine the policy of the State as the owner of mineral rights requires the considerate balancing of many conflicting interests. Even assuming that it is wise to secure a small revenue rather than leave the mineral resources undeveloped, high rates of royalties and rents may force the miner to exploit the richest lodes and so to damage for ever the associated low-grade deposits, which may be worth working when local consuming industries arise. No efficient mining enterprise is run except for profit, immediate or prospective, sufficient to recover the original capital outlay ; and the miner consequently may be driven by unduly hard terms to consider only the profits that can be earned within the period of his lease.

We might take as an example the mining of manganese ore in the Central Provinces of India, where there are deposits on a scale well in excess of any probable demand for steel-smelting in the country. In this area, some 500 miles from the coast, the local value of the ore on which royalty can fairly be levied is generally less than one-half the cost of its transport to European markets, and only high-grade ores are consequently marketable. The price of manganese, too, has varied so greatly that it has been found necessary to arrange for a sliding scale of royalty charges. Taking the later post-war years, the average price per unit of manganese at United Kingdom ports has varied from 22·9*d.* in 1924 to 9·5*d.* in 1933. Deducting ocean freights, the corresponding unit price of manganese at Indian ports has fallen in the same decennium from 16·86*d.* to 5·48*d.* After paying railway freight to the coast there is little left to meet mining costs on all except the most accessible deposits of highest grade ; and the Government royalties, based on 2½ per cent. of the pit-mouth value, have thus fallen as low as 2*d.* to 3*d.* for a ton of ore which may be sold to distant smelters for about £2. Quite obviously, here is an example which tempts the miner to " skim the cream " of the most accessible and easily worked deposits. It is an instance which should force the Government to review its mineral policy with anxiety for the future.

Manganese-mining in India happens to be so far a relatively simple proposition, both for the miner and the owner of mineral rights ; but the exploitation of complex lead and zinc deposits, like those of Upper Burma, illustrates more strikingly the contrast between raising ore for export in its raw state to distant markets, and mining for smelting on the spot. With lodes both complex and variable in nature, worked at considerable depths, in an area where labour is expensive and sparse, distant from any suitable smelting centre, the miner would be forced to work wastefully and the Government, as the owner of mineral rights, would be compelled either to accept a very small royalty or to prohibit operations altogether. Fortunately the Government adopted the more liberal policy, permitted the export of raw ore at low local values, accepted a small royalty, and in this way encouraged those mining operations which ultimately opened up and proved the existence of deposits large enough and rich enough to justify the installation of smelting plant on a large scale. As the result of this policy the Government and the mining venturer have both earned revenue on a considerable scale ; but if the Government had refused originally to grant a mining lease in this instance on what appeared to be terms insufficient to compensate for the permanent loss of the raw mineral exported, the deposits would never have been worked at all, and an asset of enormous national value would have remained buried for an indefinite time.

These two dissimilar instances have been quoted and described in general terms because the writer has a clear recollection of the discussions which led finally, some thirty years ago, to the grant of mining leases in both areas on a royalty rate as low as 2½ per cent. of the local " spot," or pit-head, value of the ore. They are but examples of the many propositions on which the whole mineral policy of the Government of India has been built up, not merely regarding the rate of royalty, but of rents, of the time-lengths of leases, of the limiting conditions of renewal, of the maximum areas granted to a company and—what is perhaps more important—of the conditions under which the preliminary stages of exploratory and prospecting licences are issued.

And the experiences on which the body of mineral law in India has been built up have corresponding features in other parts of the British Empire, corresponding but rarely parallel features, because each differs from the others in the configuration of its industrial body and in the other conditions which are necessary for successful mining enterprises. Each has learnt in its own way how to feed without pampering the goose that produces golden eggs, sometimes for sale new-laid, sometimes for the local manufacture of more highly priced " omelets " of industrial finished products.

That is why the monograph recently issued by the Imperial Institute is both opportune and instructive to a Government which is now venturing, for the first time, on a policy which recognizes—though belatedly—the importance of treating minerals as a national asset to be developed on safely established principles, with uniform rules, openly published and sufficiently stable to attract capital for investment under conditions as free as possible from the dangers of gambling.

A word now regarding the preliminary stages which lead to the grant of a mining lease. These may seem unimportant in a country like Great Britain, where the mineral deposits are generally well known. In this country we think mainly of coal, but we are still ignorant of our resources in petroleum, and consequently wise venturers will not commit themselves to any large outlay of capital on oil until the ground is proved in stages by prospecting. A review of the data summarized in the Imperial Institute volume will show that mining enterprises overseas are encouraged generally in three stages :

(*a*) *Exploration operations* by licence over wide areas for relatively short periods, periods sufficient for undertaking the geological survey necessary to establish a prima facie justification for (*b*) *prospecting operations*, for which licences are granted over smaller, but still relatively large, areas, and renewable annually, generally to not more than a maximum of five years. Within this time, and year by year, the prospector may be justified by results in spending money on borings and trial pits, until at last he feels safe in raising sufficient capital to venture on (*c*) a *mining lease*, with all its manifold obligations for a period of twenty to thirty years, over a relatively small area.

Neither the owner of mineral rights in an undeveloped country nor the mining venturer can foresee from the beginning the results of an enterprise of the sort. This is especially so in metalliferous mining and in the exploitation of petroleum. No sane Government wishes to have its name connected with crops of financial failures ; and so to reduce the element of gambling as far as possible, mining rights are thus granted in easy stages, the results of each justifying the next venture as a fair commercial risk. Practically all the apparently different rules and regulations which are detailed in the work under review for each State and Province follow these general principles in some form, although with a different terminology.

Occasionally in one of our Colonies one notices that a highly successful mining company stirs the interest and envy of the local legislator. He sees the mineral resources of his colony being depleted, and large profits going to shareholders outside. He does not always realize that for each success there are many failures, which nevertheless have brought money into his land. He does not realize that the mining venturer is entitled to an occasional windfall to cover his other losses in futile prospecting operations. But generally, on further reflection, when he adds up the money brought in and deducts that taken out as dividends, he finds a balance in favour of his own colony—money spent on labour, on local supplies, on import duties and taxes. He will realize, if he is a wise legislator, that one striking success always attracts many more prospectors, and that in the long run it is better for his colony that its minerals should be developed than be allowed to lie buried like the one talent.

In the volume under review the varied interpretations of the principles which govern the grant of mineral concessions by each Government are not critically discussed ; that would not be the proper function of a semi-official body. The monograph, however, gives a full, accurate and up-to-date summary for every part of the British Empire. It is a reference work which is indispensable to every consulting mining engineer ; for, like all the recent publications of the Imperial Institute, it is based on first-hand information obtained direct from the Governments, compiled with meticulous care and classified on a system sufficiently uniform to permit of comparative estimates being made of the essential conditions for mining investments in our dependencies overseas.

COMPETITION AND THE LAW[1]—II:

UNITED STATES OF AMERICA.

[*Contributed by* E. WYNDHAM WHITE, ESQ., LL.B.]

"THE American dream," the ideal of both Lincoln and Jefferson, has always been that of a nation consisting as largely as possible of free citizens each owning and running his own farm or his own business, independent both economically and politically, able and ready to stand up for his own rights and his own views against any pressure from others. Actual development has been widely divergent from this ideal. Under the impelling motive of the expectation of savings to be made by mass production, unified control and the elimination of competition there has for many years been a tendency to eliminate the independent citizen, owning and running his own business, in favour of vast organizations, the ultimate control of which, through an intricate network of holding companies and subsidiaries, is vested in financial groups in New York. But the ultimate belief in the beneficence of free competition lingers on and finds expression in the anti-trust and anti-monopoly laws. Free competition, on the other hand, must be "fair" competition, and where the competitive process is abused the law must intervene. These interventions make up the doctrine of "unfair competition."

The Common Law and Competition in the United States.—Apart from legislation judicial definition of unfair competition in the United States has limited its scope to three fairly well-defined classes of trade practices, namely: (1) methods involving misrepresentation, fraud and deceit; (2) methods involving coercion; and (3) methods tending to restrain trade or promote monopoly. The majority of the cases comprised under these three headings have already been considered in our review of the Common Law in England.[2]

The term "unfair competition" is applied strictly in its narrowest sense by American lawyers to cases of passing off the defendant's goods as those of the plaintiff.[3] This tort, which has been called the "orthodox tort of unfair competition," has, however, been extended to include other cases:

(1) Intimidation of a competitor's agents or interruption of their negotiations with customers[4];

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[1] The first article in this series appeared in *Journ. Comp. Leg.*, vol. xix, pt. i, pp. 38 *et seq.*

[2] *Journ. Comp. Leg.*, vol. xix, pt. i, pp. 43 *et seq.*

[3] *American Waltham Watch Co.* v. *U.S. Watch Co.*, 173 Mass. 85; *Coats* v. *Merrick Thread Co.*, 149 U.S., 562, 566; Nims, *Unfair Competition*, 2nd ed., s. 4.

[4] *Evensong* v. *Spaulding*, 150 Fed. 517.

(2) Purely "malicious" competition. It appears from the cases of *Tuttle* v. *Buck*,[1] and *Dunshee* v. *Standard Oil Co.*[2] that there can in this case be an actionable tort even if there is no element of combination or conspiracy. In the former case the plaintiff had an established and profitable business as a barber, and the defendant, a banker, owned a building which he wished the plaintiff to occupy with his shop. This being declined, it was alleged that the defendant sought to punish the plaintiff by injuring his trade and driving him out of business. To that end the defendant employed other barbers to occupy the shop and entice away the plaintiff's patrons, whom he personally and persistently solicited no longer to employ the plaintiff's services, and by these and other wrongful means did in fact injure the plaintiff's business, all of which was done with the sole design of injuring the plaintiff and not for the purpose of serving any legitimate interest of the defendant himself. This was held to disclose a good cause of action.[3] In giving this decision the court said :

> To divert to oneself the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interests and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort.

The court in the *Dunshee Case*[4] adopted this statement of the doctrine as "a healthful one, the application of which can give ground of complaint to no honest man, and will work injury to no business conducted with due regard to fair and upright dealing." It is otherwise if the defendant acts to benefit himself and the resulting benefit is "direct" ; in that case resulting harm to the plaintiff is justified in the interest of competition.[5] Where, however, the defendant seeks a "remote" or indirect benefit to himself, his immediate purpose being to injure the plaintiff, his liability depends upon the methods he employs. It is by no means clear from the decided cases what benefits are indirect or remote, nor what methods are permissible. It appears that each case will be decided by the court's conception of what is fair or commercially desirable ; or in the words of the court of New Hampshire : "The standard is reasonable conduct under all the circumstances of the case."[6]

(3) The defendant's use of the plaintiff's trade name or picture on a product which is of a similar class to the plaintiff's product even though it does not compete with it.[7]

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[1] 107 Minn. 145.

[2] 152 Ia. 618.

[3] Cf. the attitude of the English courts to similar facts in *Bradford Corporation* v. *Pickles* [1895] A.C. 587.

[4] *Ubi supra.*

[5] *Passaic Print Works* v. *Ely Walker*, 105 Fed. 163.

[6] 75 N.H. 351, *per* Peaslee J.

[7] *Aunt Jemima Mills Co.* v. *Rigney & Co.*, 247 Fed. 407 ; *Aluminium Cooking Utensil Co.* v. *Sargoy Bros. & Co.*, 276 Fed. 447. In the first case the defendants were restrained from using the plaintiffs' trade mark used by them for selling flour, for

(4) Advertising of the defendant's inferior imitation as the equivalent of the plaintiff's product, or advertising calculated to confuse a purchaser.[1]

In *International News Service* v. *Associated Press*[2] the court condemned as unfair the immediate use for profit by one news agency of news collected and distributed by another agency. The basis of the decision was that the plaintiffs had a quasi-property in the news and for that they were entitled to protection.

> Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi-property, irrespective of the rights of either as against the public.[3]

Attempts have been made[4] to extend this principle to other cases where the defendant avails himself of the plaintiff's industry without giving compensation, when, as has been suggested,[5] he may aptly be said to be taking a "free ride." No definite rules have, however, yet been formulated by which the legality of such commercial piracy may be tested.[6]

In concluding these remarks on the developed American Common Law relating to competition it may be useful to point out that the process of identifying with monopoly itself all the acts and practices from which it was deemed there resulted a part if not all of the injurious consequences attributed to monopoly which we have seen[7] in operation in the English courts, is apparent in American law also. The American courts, too, have directed their attention more to results than to the accurate nomenclature of the acts or states of affairs giving rise to those results.[8] Acts which tended unduly to reduce competition and to enhance prices have come to be regarded as restricting the due course of trade and therefore as in restraint of trade.[9]

Statutory Regulation of Competition.—The Common Law proved wholly inadequate as a check upon unfair methods of competition in the

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the purposes of selling syrup, both articles being food products. In the second case an injunction was granted against the use of plaintiffs' trade mark, under which the plaintiffs sold aluminium cooking utensils, for the sale of tin wash boilers. Cf. the English case of *Eastman Co.* v. *Kodak Cycle Co.*, 15 Rep. Pat. Cas. 105 ("Kodak" cameras and "Kodak" cycles).

[1] *Myles Standish Mfg. Co.* v. *Champion Spark Plug Co.*, 282 Fed. 961.

[2] 248 U.S. 215. See also *National Telephone News Co.* v. *Western Union Telegraph Co.*, 119 Fed. 294.

[3] *Per* Pitney J., at p. 236.

[4] See dissenting judgments in *Gotham Music Service* v. *D. & H. Music Pub. Co.*, 259 N.Y. 86.

[5] 46 H.L.R. 1173.

[6] *Gotham Music Service* v. *D. & H. Music Pub. Co.*, *ubi supra*.

[7] *Journ. Comp. Leg.*, vol. xix, pt. i, p. 39.

[8] As an illustration of this tendency C.J. White in *Standard Oil Co.* v. *U.S.*, 221 U.S. 56, cites an early Massachusetts statute by which monopoly and forestalling were treated as one and the same thing: Mass. Laws of 1778–9, c. 31.

[9] *National Cotton Oil Co.* v. *Texas*, 197 U.S. 115; *Shawnee Co.* v. *Anderson*, 209 U.S. 423.

wider sense and there is a mass of statute law passed with the twofold object of protecting the business man from practices harmful to him, and the public from dishonest or fraudulent practices.

In most of the states the legislature has attempted the task of regulating competition. In almost all cases the method adopted has been to declare certain specific practices to be illegal and to impose penalties for violation of the statutory prohibition, the Attorney-General usually being charged with the enforcement of the law by criminal prosecution or *quo warranto* proceedings against the offenders. It would be impossible to give in a short space any adequate summary of the state legislation[1] in this field; it may be said that the general tendency is to declare illegal all combinations to restrain trade, to limit production, to fix prices, or to prevent competition, and this policy involves *inter alia* the prohibition of monopolies and pooling, agreements or conspiracies in restraint of trade, restraint of competition (as distinct from restraint of trade) such as price control, fixing a standard price or local price discriminations, limitation of output, division of territory, or restraint on re-sales. The first efforts of the legislatures were directed towards enlarging and extending the Common Law prohibition against contracts in restraint of trade and repressing the grosser forms of monopoly; subsequently unfair discrimination between sections and localities was prohibited, and finally statutes were enacted attempting to cover other unfair practices under the general term "unfair competition."[2]

The Federal Legislature and Unfair Competition.—One of the major defects of the Common Law was that the only remedies it gave in a case where any of its rules was broken were that it would refuse to enforce any forbidden contract or would restrain any forbidden act by injunction, and a party injured by a practice forbidden by the courts had an action for damages for any injury which he had suffered. One of the most important effects of the Sherman Act of 1890 was to remedy this defect and afford better remedies by making conduct in violation of its provisions a criminal offence and encouraging the plaintiff in a civil suit by the prospect of triple damages. The effect of the Act is thus stated by Judge Taft in the *Addystone Pipe Case*[3]:

> The effect of the Act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanour and to create a civil action for damages in favour of those injured thereby and a civil remedy by injunction in favour of both private persons and the public against the execution of such contracts and against the maintenance of such trade restraints.

The weakness of the Act lay in the fact that its enforcement depended on the attitude of succeeding ministries and on men who were picked, usually for political reasons, for the Attorney-Generalship. Furthermore, it became apparent that the policy of waiting until the particular scheme had been put into operation was inadequate and unsatisfactory, and the view gained ground that the better method would be the eradication of certain devices and methods of business which fostered monopoly.[1] This development of policy resulted in the setting up of a Federal Trade Commission by President Wilson.[2] This was supplemented by the Clayton Act,[3] which made no new departures but attempted a classification of the provisions of the Sherman Act.

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[1] A comprehensive summary is given in a note to an article by C. G. Haines, 29 Yale L.J., p. 11, n. 36.

[2] This legislation has no extra-territorial operation and is therefore limited to the regulation of intra-state commerce only.

[3] 175 U.S. 136.

We now proceed to examine in greater detail the provisions and operation of these Acts.

The Sherman Act of 1890.—The Federal Anti-Trust Law or—to give it its usual title—the Sherman Act, was enacted on July 2, 1890, by virtue of Art. 1 of s. 8 of the American Constitution, which enables Congress to " regulate commerce among the several states." It is described in the preamble as " an Act to protect trade and commerce against unlawful restraints and monopolies."

Section 1 provides that :

> every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in such combination or conspiracy, shall be deemed guilty of a misdemeanour, and on conviction thereof shall be punished, etc.

Section 2 :

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce among the several states, or with a foreign nation, shall be guilty of a misdemeanour . . .

Proceedings under the Act are to be instituted in equity by the district attorneys of the respective States, under the direction of the Attorney-General, and the several circuit courts are invested with jurisdiction to prevent and restrain violations of the Act. Any person injured as a result of any act forbidden by the statute may sue for threefold damages.

The statute is framed in the widest terms and, as was pointed out by Judge Ward in the *Tobacco Case*,[4] s. 2 cannot be taken in its natural sense, " as this section prohibits a monopoly of or an attempt to monopolize any part of such commerce, and . . . " so applied the Act would prohibit commerce altogether. " The first and second sections must be read together, and I think mean the same thing ; the second adding nothing except to extend the prohibition to individuals who without combination, monopolize or attempt to monopolize." The courts have given the Act a limited construction and tempered its provisions to harmonize with the more liberal public opinion of the first decade of the twentieth century. In *U.S.* v. *Trans-Missouri Freight Association*[1] it was urged that Congress could not have intended to embrace all contracts but only such contracts as were in unreasonable restraint of trade. The majority of the court refused to accede to this restricted interpretation of the words "contract in restraint of trade." A minority judgment was delivered by Mr. Justice White, who argued strongly for the narrower construction, and it is this judgment which was to form the basis on which the later cases proceeded in interpreting the Act. The *Missouri Case* was followed in *U.S.* v. *Joint Traffic Association*,[2] and again in *Northern Securities Co.* v. *U.S.*,[3] which also established the important principle that combinations by way of fusion come under the ban of the law as much as combinations by means of agreement.[4]

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[1] Watkins, *Industrial Combination and Public Policy*, p. 252.

[2] (1914) 38 U.S. Stat. 717.

[3] (1914) 38 U.S. 730.

[4] *U.S.* v. *American Tobacco Co.*, (1908) 164 Fed. 700, 727.

Finally, in 1911, the Supreme Court emphatically negatived the principle laid down in the *Missouri Case* and adopted in its stead the doctrine advocated by the minority in that case: *Standard Oil Co. of New Jersey* v. *U.S.*[5]; *U.S.* v. *American Tobacco Co.*[6]

In giving the judgment of the Court in the former case, White C.J. said:

> . . . The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, [and therefore] the statute . . . evidenced an intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference which is an undue restraint.[7]

The Act did not specify but indubitably contemplated and required some standard, and so "it follows that it was intended that the standard of reason which had been applied at the Common Law and in this country dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."[8] The learned Chief Justice made some show of reconciling the decisions in the early cases, but the attempt is not very convincing nor very determined.

In the *Standard Oil Case* the court applying these principles held that the unification of power, control and capital in one corporation raised a *prima facie* presumption of intent to dominate the oil industry with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of petroleum and its products, in violation of the Sherman Act. The *Tobacco Case* provided the court with another opportunity of subjecting the statute to the rule of reason; the principle is again affirmed in unequivocal terms and applied more particularly to s. 2.[1]

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[1] (1897) 166 U.S. 290. [2] (1898) 171 U.S. 505. [3] (1904) 193 U.S. 197.

[4] Mr. Justice Holmes dissented from this decision, his opinion being that a combination in the form of a corporation was valid under the Act.

[5] 221 U.S. 1. [6] 221 U.S. 106. [7] 221 U.S. at p. 59.

[8] *Ib.* at p. 60; the same principle was affirmed in *Nash* v. *U.S.*, 229 U.S. 373.

It is important at this stage to note that there is a considerable difference between the English rule of reasonableness and the American Common Law rule, a difference accompanied by important practical consequences. Thus in *Dr. Miles Medical Co.* v. *J. D. Park & Sons*[2] a manufacturer of unpatented proprietary medicines fixed the retail prices by contract with his dealers. The court held the contract to be void both at Common Law and under the Sherman Act.

> Agreements and combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.[3]

This decision stands out in sharp contrast to the English case of *Palmolive Co.* v. *Freedman*,[4] and earlier decisions such as *N.W. Salt Co.* v. *Electrolytic Alkali Co.*[5] The contrast is clearly brought out by Lord Parker's summary of the English doctrine in *A. G. of the Commonwealth of Australia* v. *Adelaide Steamship Co.*[6]: "The Crown, therefore, cannot in their lordships' opinion rely on the mere intention to raise prices as proving an intention to injure the public."

Mr. Justice Holmes clearly demonstrated the cleavage between the two theories in a dissenting judgment in the *Miles Case*, which is an accurate summary of the English doctrine:

> I think we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We none of us can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course I am speaking of things we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter, it seems to me that the point of most profitable returns marks the equilibrium of social desires, and determines the fair price in the only sense in which I can find meaning in those words.[7]

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[1] 221 U.S. 106, 180.
[2] (1911) 220 U.S. 373.
[3] *Per* Hughes J., *ib.*, p. 408.
[4] [1928] Ch. 264, and see *Journ. Comp. Leg.*, vol. xix, pt. i, p. 42.
[5] [1914] A.C. 461, 477.
[6] [1913] A.C. 781, 810.

[7] In the English cases, too, as we have seen (*Journ. Comp. Leg.*, vol. xix, pt. i, p. 42), we constantly come across the suggestion, here made by Holmes J., that there may be a distinction where essential commodities are in question. In the United States the Fair Trade Acts in nine of the States (Illinois, Iowa, Maryland, New Jersey, New York, Oregon, Pennsylvania, Washington, Wisconsin: see 49 H.L.R. 812 n. (3)) have declared resale price maintenance agreements to be valid, and have moreover sought also to bind strangers to observe the contractual price restrictions. Contracts between producers, between wholesalers, or between retailers are excluded, so

> I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.[1]

On the other hand, it was held in *U.S.* v. *Colgate*[2] that the conduct of a manufacturer which, as intended, has the effect of procuring adherence on the part of its wholesale and retail customers to resale prices fixed by him does not offend against the unlawful combination provisions of the Sherman Anti-Trust Act, provided there was no agreement which obliged any dealer not to resell except at the fixed prices, his course in this respect being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him. The distinction between the *Miles* and *Colgate* cases is explained in *U.S.* v. *Schrader's Son Inc.*[3] :

> It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealings or other circumstances—with all customers throughout the different states, which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers, and there is no contract or combination which imposes any limitations on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the states.[4]

The courts, then, have now decided that the rule of reason is to govern the Sherman Act, but within that limit its operation is very wide. Thus in *Swift & Co.* v. *U.S.*[5] a combination of dealers in fresh meat throughout the United States not to bid against each other in the livestock markets of different states, to fix resale prices, to restrict shipments and keep a blacklist was held to be an illegal combination under the Act. In *Eastern States R. L. D. Assn.* v. *U.S.*[6] Mr. Justice Day, citing *Gompers* v. *Bucks Stove and Range Co*,[7] said[8] :

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that it is evident that what is intended to be legalized is vertical and not horizontal combination. The statutes further declare that knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in contracts thus legalized is unfair competition and actionable by any person damaged irrespective of whether the person advertising or selling is a party to the contract. The constitutionality of these Acts is, however, very doubtful, and their effect in any case, since they conflict directly with the federal rule, is limited to transactions in intrastate commerce.

[1] Cf. the statement of Lord Haldane in *N.W. Salt Co., Ltd.* v. *Electrolytic Co., Ltd.*, *ubi supra*, at p. 480, quoted *Journ. Comp. Leg.*, vol. xix, pt. i, p. 40.

[2] (1920) 252 U.S. 85.

[3] (1920) 252 U.S. 85, 99.

[4] And see *Frey & Sons Inc.* v. *Cudahy Packing Co.* (1921) 256 U.S. 208 ; *Federal Trade Commission* v. *Beech Nut Packing Co.* (1922) 257 U.S. 441.

[5] 196 U.S. 375.

[6] 234 U.S. 600.

[7] 221 U.S. 418.

[8] 234 U.S. at p. 611.

> The principle announced by the Court was general. It [the Sherman Act] covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital or unlawful combinations of labour ; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter.

The court in this (*Eastern States*) case applied the principle in declaring illegal a trade association of lumber dealers which circulated among its members a report containing the names of wholesalers who dealt with consumers direct, the purpose and effect of which was to induce retailers to refuse to deal with the listed wholesalers, though there was no agreement to this effect.

The essence of offences against the Act is not the mere fact of combination, but the restriction of competition : *United States* v. *U.S. Steel Corporation.*[1]

The Federal Trade Commission and the Clayton Act.—As we have already pointed out,[2] the Sherman Act failed to give anything like general satisfaction. It was felt that condemnation of unfair practices should be more specific and that the courts had seriously circumscribed its effectiveness by the narrow interpretation which they had put upon it. Moreover, there was the very important consideration that the determination of the fairness or unfairness of business methods involves questions which are largely economic as well as legal. After considerable agitation the Federal Trade Commission and Clayton Acts were passed in 1914 to remedy the defects which had been pointed out.

The Federal Trade Commission Act went much further than the Sherman Act. It set up a special commission to check the use of " unfair methods of competition," and in particular the specific offences defined by the Clayton Act. The Commission consists of five members (consisting not only of lawyers but also of experts in economics and statistics) appointed by the President on the advice of the Senate and is responsible not to the Executive but to Congress. S. 5 of the Act declares unlawful certain methods of competition and directs the Commission to prevent such practices by persons, partnerships or corporations, except banks and common carriers. The Commission is authorized after due hearing to issue orders requiring the cessation of unfair practices. To secure the observance of such orders the Commission may apply to the federal courts, submitting the entire record in the case, and the court may affirm, set aside or modify the order. If new evidence is submitted to the court, the case is to be returned to the Commission. A party ordered by the Commission to cease unfair methods of competition may likewise appeal to the courts for a review of the order. The Commission is also authorized to investigate alleged violations of the Anti-Trust Acts, to make recommendations for the readjustment of the business of the offending corporation, to publish such portions of the information as it shall deem expedient to the public interest, and to report to Congress, with recommendations, on conditions affecting the foreign trade of the United States. The Commission has full power to summon witnesses, and a person giving evidence is indemnified from prosecution on any incriminating statement he may have made. The findings of fact of the Commission, if supported by evidence, are conclusive.

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[1] 251 U.S. 417.

[2] *Supra* p. 34.

The findings of the Commission are, as we have seen, subject to judicial review. The extent of this appellate jurisdiction has given rise to some difficulty, but the assumption by the courts of a judicial power to review on its merits every case decided by the Commission, which was asserted in *Federal Trade Commissioners* v. *Gratz*,[1] seems not to be justified. The proper principle would seem to be that the court is entitled to determine whether or not the conduct in question is of a character that may be unfair and unlawful, and the Commission whether the facts in a given case amount to a violation of the law. " The words ' unfair method of competition ' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include "[2]; and Mr. Justice Brandeis, in a dissenting judgment in the same case, said[3]:

> Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts. Congress imposed upon the Commission the duty of finding the facts, and it declared that findings of facts so made (if duly supported by evidence) were to be taken as final. The question whether the method of competition pursued could on those facts reasonably be held by the Commission to constitute an unfair method of competition, being a question of law, was necessarily left open to review by the Court.

And in the *Beech Nut Case*[4] it was said that Congress purposely left undefined the phrase " unfair methods of competition," in order that the courts might have wide discretion to determine the scope of the Commission's jurisdiction as unforeseen situations arose.

The decisions which have come after the *Gratz Case*, both in the Supreme Court and the lower federal courts, have in the main shown a greater respect for the findings of the Commission.[5]

The power of inquiring into unfair methods of competition extends to all types of deceptive and dishonest trade practices, including misleading brands and trade marks, and fictitious price marks which are ostentatiously struck out to make the purchaser believe that he is receiving a discount. The element of injury to the public is a jurisdictional requirement: *Federal Trade Commission* v. *Klesner*, 280 U.S. 19.

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[1] 253 U.S. 421.

[2] *F.T.C.* v. *Gratz*, *ubi supra*, at p. 427, per McReynolds, J.

[3] At p. 437.

[4] *Infra.*

[5] See, *e.g.*, *Federal Trade Commission* v. *Beech Nut Packing Co.*, 257 U.S. 441; *Aluminium Co. of America* v. *Federal Trade Commission*, 284 Fed. 401; 261 U.S. 616.

The procedure thus made available is expeditious, easy and inexpensive, and so is available to large and small concerns alike. There is no doubt that it remedied most of the defects which were the basis of criticism of the operation of the Sherman Act, though perhaps it has not quite justified all expectations.

The Clayton Act, 1914.—The Clayton Act made no fresh departure in principle, but was mainly concerned with attempting a classification of practices against which the Sherman Act had been directed and whose suppression was now to be the task of the newly constituted Federal Trade Commission. S. 2 of the Act declares it unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities sold for use, consumption or resale within the jurisdiction of the United States, when the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce and that nothing shall prevent discrimination in prices made on account of differences in the cost of selling or transportation, or in order to meet competition, in good faith, and with the further proviso that this section shall not prevent persons from selecting their own customers in *bona fide* transactions not in restraint of trade.

S. 3 declares it unlawful for any person engaged in commerce to lease or sell commodities patented or unpatented, or to fix a price therefor or a discount from such price on the condition that the lessee or purchaser shall not deal in the commodities of a competitor, where the effect of the lease or sale may be substantially to lessen competition or tend to create a monopoly.

S. 7 provides that no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be substantially to lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

S. 8 imposes important limitations on interlocking directorships, except in the case of banks and common carriers.

S. 11 vests the authority to enforce compliance with ss. 2, 3, 7 and 8 in the Federal Trade Commission.

The Webb Pomerene Act, 1918.—The purpose of this Act was to remedy the grievances of American businesses engaged in export trade who were hampered by the Anti-Trust Acts in their efforts to compete with foreign rivals who were subject to no similar restrictions. The Act applies only to an " association " engaged *solely* in export trade. It provides that nothing contained in the Sherman Law shall be construed as rendering illegal such an association, or any agreement made or act done by it in the course of export trade " provided such association, agreement or act is not in restraint of the export trade of any domestic competitor of such association," and that the association does not enter into any agreement or conspiracy "artificially or intentionally" to enhance or depress prices, or substantially lessen competition in the United States.

The Act makes provision for filing articles of association with the Federal Trade Commission, the rendering of periodic statements and any additional information called for. If the Federal Trade Commission is of opinion that the Act is being violated, it is empowered to recommend any changes it may deem necessary to enforce compliance with the law. If the recommendations are not complied with, the case may be referred to the Attorney-General.

The N.R.A. and the Law of Unfair Competition.—The whole structure of American industry was profoundly modified by the National Industrial Recovery Act, which was the most ambitious legislative experiment of the first Roosevelt administration. It is impossible and, since the Act is now clearly held to be unconstitutional, unnecessary to consider this legislation in any detail here, but it so radically affected the whole law of unfair competition for the brief period that it was in force that its main outlines are of great interest and importance to this discussion.

The Act provided for the adoption of Codes for most of the major industries of the country, the Codes consisting of a set of rules regulating the conduct of that branch of industry to which they applied. Compliance with the Codes was ensured on the one hand by federal supervision through sanctions prescribed in the Act, and on the other hand by industrial self-regulation through the administrative agencies set up by most of the Codes themselves.

It was provided by s. 3 (*b*) that the provisions of each approved Code should be the standard of fair competition for the trade or industry concerned, any violation of which in or affecting interstate commerce should be an unfair method of competition within the meaning of the Federal Trade Commission Act.[1] The same section provided for more direct enforcement by injunction and fine.[2]

Most of the Codes provided for the setting up of a Code Authority which might be either a new group representative of the industry,[3] or an existing trade association.[4] The Authority had wide administrative powers and power to bring breaches of the Code to the notice of the Recovery Administrator and to recommend legal proceedings. It is apparent that where the authority was a trade association its power of compulsion was great since it became freed from the anti-trust laws [5] and therefore of greater power and value to its members. Violators of the Code provisions could be punished by expulsion or in some cases by fine.

Amelioration of the trust laws was an essential part of the administrative system set up by the Act. It was provided by Tit. I, s. 3, that the anti-trust laws should not apply to any action taken by an industrial organization pursuant to an approved Code or agreement ; though there was an absolute proviso that " Codes shall not permit monopolies or monopolistic practices." The President's power to approve any Code was expressly subject to the observance of this proviso and to his being satisfied that the Code was not designed to oppress small enterprises.[1]

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[1] Tit. I, s. 3 (*b*).

[2] Tit. I, s. 3 (*f*).

[3] See, *e.g.*, *Code for the Petroleum Industry*, art. vii.

[4] *Code for the Automobile Industry*, art. vi.

[5] Tit. I, s. 3 *infra*.

A feature common to most of the Codes was price-fixing provisions which in some cases were extremely drastic and would clearly have been illegal under the Anti-Trust Acts, and were protected only by the provisions of s. 3.

It is by no means clear what was intended by the " monopoly " proviso to s. 3 ; if it was to be given the meaning suggested by the Court in the *Standard Oil Case*, *i.e.* as being practically synonymous with restraint of trade, then it is arguable that the N.R.A. effected little or no relaxation of the Anti-Trust laws, whereas, if the expression is given its more popular sense the Codes satisfied the condition since they were representative of the whole industry affected, and not merely of a powerful minority.[2] It is not possible to estimate what the effect of the Act would have been on the subject of competition because its precise operation depended upon the interpretation which the court placed upon its rather vague language, a factor which, as we have seen, modified the operation of both the Sherman and Federal Trade Commission Acts. However, the doubts which had been frequently expressed as to the constitutionality of the National Industrial Recovery Act and the Codes made thereunder were confirmed by the Supreme Court in *U.S.* v. *Schechter*,[3] in which case it was decided that the Act itself and the Codes were unconstitutional. The grounds for the decision were twofold. In the first place the Act contemplated[4] an excessive delegation of legislative power ; and secondly, in that particular case, the Act was also unconstitutional because it exceeded the power of Congress to regulate interstate commerce and invaded the powers reserved exclusively to the States. The court was of opinion that a state of emergency does not justify action which lies outside constitutional authority.[5] The other defence of the Government, that the Codes were voluntary, was disposed of as " the statutory plan is not one simply for voluntary effort . . . it involves the coercive exercise of the law-making power." [6]

Regulation of the Chain-stores : the Robinson-Patman Act.—The cry of the independent retailer against the chain-store has been likened[7] to the " jeremiad of the hand-weavers at the time of the industrial revolution." It has nevertheless created a considerable sentiment against the chain-store system, which has been effective in legislative bodies in the U.S.A. in two ways—(*a*) in legislation intentionally designed to burden the chain-stores themselves, and (*b*) in restraints on certain methods of doing business not confined to the chain-stores but especially practised by them. Of the first class of legislation the most obvious and direct is to forbid more than a certain number of stores in a chain. A Maryland law[1] forbade more than five stores per chain in Alleghany county, though the statute was eventually held by a lower state court to be unconstitutional. But by far the most common method of discrimination against chain-stores is by taxation. Thus licence taxes have been levied on part or all of the stores in a chain with more than a certain number of establishments,[2] or the tax may vary with the length of the chain. Most of these enactments have, however, been held unconstitutional, and the more general method adopted is to impose a gross sales tax varying with the volume of business done. But it is obvious that this expedient does not penalize the chain-store alone and bears equally heavily on the large local store with a considerable turnover. This difficulty has led to proposals that stores should be classified according to gross sales, but the tax should be increased within each class as the number of stores owned by the taxpayer grows.

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[1] N.R.A. Tit. I, s. 3 (*f*).

[2] This point is fully discussed in 47 H.L.R. at p. 104. There is a very full and instructive account of the National Industrial Recovery Act in 47 *Harvard Law Review*, at pp. 108 *seq.* and 462 *seq.*

[3] 295 U.S. 495.

[4] Tit. I, s. 3.

[5] 295 U.S. at p. 528.

[6] *Ib.* at p. 529.

[7] 44 H.L.R. 456.

In 1928 the Senate directed the Federal Trade Commission to inquire into the chain-store system to discover violations of existing federal anti-trust laws and to recommend legislation necessary to cover the situation. The report of this inquiry was published in 1935,[3] and was followed very shortly by the enactment of the Robinson-Patman Act in 1936.[4]

The earlier anti-trust laws were mainly concerned with market problems incidental to the monopolistic size and strength of producers, that is, of sellers. The progressive monopolization of the process of distribution has shifted public interest to the new problems of controlling prices in a market where there are a few powerful buyers. The special problem in this field is price discrimination imposed by the powerful buyer on the comparatively weak seller, a device which has accompanied and facilitated the growth of the large distributive unit like the chain-store or mail order business. Manufacturers sell to the chains at prices below those charged to independent retailers buying direct, and in many cases, even below those charged to regular wholesalers. Though part of these concessions may properly be based on economy of production, selling and delivery costs in quantity selling, there is no doubt that part is a concession to the bargaining power of the chains. As a result of this advantage in purchasing costs allied to their lower operating costs, the chains have been able fairly consistently to undersell independent retailers. S. 2 of the Clayton Act is not sufficiently wide to meet the case. An early attempt to have resort to that section was unsuccessful,[1] and no further attempt was afterwards made to bring these practices within the Act. The Robinson-Patman Act is an amendment to s. 2 of the Clayton Act, and is designed as an inclusive prohibition against discriminating pricing in interstate commerce. Though aimed primarily against the chain-store, the Act is in terms a general measure which profoundly affects the existing law of unfair competition in business generally.

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[1] Md. Laws, 1927, c. 554, 1.

[2] See, *e.g.*, 2 of the same statute, $500 per year on each store in the chain.

[3] Sen. Doc. No. 4, 74th Cong. 1st Sess., 1935.

[4] 49 Stats. 1526, 1528; exhaustively analysed in 46 Y.L.J., pp. 447 *et seqq.*: *The Robinson-Patman Act in Action.*

S. 1 (*a*) makes it " unlawful for any person . . . either directly or indirectly, to discriminate[2] in price between different purchasers of commodities of like grade and quality where either or any of the purchasers involved in such discrimination are in interstate commerce." Under s. 2 of the Clayton Act it was necessary to show that the effect of the alleged discrimination in price " may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The new Act provides, however, that it shall only be necessary to show that the effect may be " to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them." There is an important saving clause which provides that nothing in the subsection

> shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which commodities . . . are sold or delivered," though the Federal Trade Commission may " establish quantity limits as to particular commodities where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce . . . and the foregoing shall not then be construed to permit differentials based on differences in quantities greater than those so fixed.

Subsection (*a*) further provides that " nothing herein shall prevent persons . . . from selecting their own customers in *bona fide* transactions and not in restraint of trade."

Subsection (*b*) places upon the accused the " burden of rebutting the *prima facie* case " made by showing that there has been discrimination, but a seller may rebut that case by showing that the discrimination " was made in good faith to meet an equally low price of a competitor."

The Act also deals with certain specific devices by which the discrimination may be made.

Thus, subsection (*c*) prohibits all types of false brokerage allowances, subsection (*d*) prohibits the granting of discriminatory allowances by the seller to the buyer in consideration for various services or facilities furnished by the latter, and subsection (*e*) prohibits the seller from himself furnishing services to the buyer on discriminatory terms. These subsections are intended to cover cases where discrimination was ingeniously cloaked under the guise of payment for services which were either not rendered at all, or if they were, then they were grossly over-compensated, or again the service was beneficial to the buyer's own business, *e.g.* advertising allowances.

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[1] *Mennen Co.* v. *Federal Trade Commission*, 288 Fed. 774 ; *National Biscuit Co.* v. *Federal Trade Commission*, 299 Fed. 733.

[2] Discrimination under the Act seems to mean a difference in price between purchasers for whom circumstances demand equal treatment : 50 H.L.R. 106.

Subsection (*f*) declares that "it shall be unlawful for any person engaged in commerce in the course of such commerce knowingly to induce or receive a discrimination in price which is prohibited by the section."[1]

The third section is a departure from the policy of the earlier anti-trust laws in that it prohibits certain discriminatory transactions regardless of their effects upon competition generally or upon competitors of the parties involved[2]; it is intended to reach discriminatory practices resulting in injury to a single individual as well as to competition generally, and it has been suggested[3] that the lack of necessity of proof of social damage or of a tendency to promote monopoly may lay this section open to constitutional objections.

The section forbids "any person engaged in commerce . . . to be a party to, or assist in, any sale which to his knowledge grants any discount, rebate, etc., not available to competitors of the purchaser in contemporaneous sales of goods of like grade, quality and quantity." It also declares it unlawful "for any person engaged in commerce . . to sell goods in any part of the United States at prices lower than those exacted by such person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such parts of the United States; or to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." It will be noted that none of the exceptions and safeguards contained in s. 1 is expressly made applicable to s. 3, except differences based on grade, quality or quantity.

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[1] Cf. s. 2 of the Clayton Act, which only made unlawful the *granting* of a discrimination in price.

[2] 46 Y.L.J. 451.

[3] 50 H.L.R. 119.

(*To be concluded.*)

CONTRACTS OF SERVICE FOR LIFE IN COMPARATIVE JURISPRUDENCE.

[*Contributed by* Ernst J. Cohn, LL.D. (*University of Breslau*), *of Lincoln's Inn, Barrister-at-Law.*]

English and American Cases.—In *Warner Bros. Pictures Incorporated* v. *Nelson*[1] the plaintiffs, a film-producing company, claimed an injunction against the defendant, a film actress, to restrain her from breaking an agreement. This agreement, according to an interpretation, of which it appeared to be very well capable, made it possible for the plaintiffs to retain the services of the defendant for the duration of her entire life. It was argued on behalf of the defendant that in consequence of this the agreement was invalid. But Branson J. rejected this plea. He said: " No authority was cited to me in support of the proposition that such a contract is illegal and I see no reason for so holding. Where, as in the present contract, the covenants are all concerned with what is to happen while the defendant is employed by the plaintiffs and not thereafter there is no room for the doctrine of restraint of trade." That contracts for life service are not within the rule as to restraint of trade will scarcely seem doubtful. On principle, however, it could very well be argued that they should at the present day be considered as opposed to the policy of English law. It appears that this argument has been put forward several times before the courts of Anglo-Saxon countries. Only one English case, however, is directly in point. In *Wallis* v. *Day*[2] the plaintiff sold his business as a carrier to the defendants and covenanted that against their paying him £2 3*s*. 10*d*. weekly for fifteen years he would refrain from competing with them and would render them services as assistant in the business for the rest of his life. Lord Abinger, in giving judgment for the plaintiff, said: " It was urged that as the contract is to serve for life it is illegal. There is no authority for that position and I know of no principle that makes it so. On the contrary, my brother Parke has referred me to a case in Viner, 15 Vin. Abr. 323, Master and Servant N. 5, in which it is laid down that in order to maintain an action against a person who contracts to serve for life the contract must be by deed." The Scottish cases dealing with our problem will be discussed later. There is at least one American case[3] which takes the same line as *Wallis* v. *Day*.

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[1] (1936) 3 A.E.R. 160, 53 T.L.R. 14.

[2] (1837) 2 M. & W. 273. See Pollock, *Contracts*, 10th ed. (1936), p. 409, note *u*.

[3] *Caring* v. *Cair*, (Supreme Court of Massachusetts, 1897) 57 Am. St. Rep. 488, see Williston, *Contracts*, vol. 1 (1926), § 495, p. 970. The other three cases quoted by Williston in note 47 on p. 970 are not in point.

There the plaintiff had sold his business to the defendant and had entered into the " permanent service " of the defendant. This was taken to mean that he had contracted to work for the plaintiff for the rest of his life, but the judge found " nothing unlawful or against public policy " in such a contract.

It may be that this attitude on the part of the judges in the last two cases finds its explanation in the fact that in both cases the nullity of the contract was contended not on behalf of the servant, but on behalf of the master, who thereby hoped to escape his liability towards the servant. *Warner Bros.* v. *Nelson* is probably the first English case where the servant himself pleaded the nullity of a service contract for life.

Jewish Law.—The question whether the law should set a limit to the duration of contracts of service has a long and even venerable history. It already plays a conspicuous rôle in Biblical law. According to Lev. xxv. 39–55 a limit was set even to the duration of slavery (six years) if the slave was a member of the Israelitic community, and from Deut. xv. 18 it appears that contracts of service were limited to a period of not more than three years.[1]

The later development of Jewish law relating to the hiring of services in post-Biblical times, when slavery became obsolete,[2] shows that Jewish lawyers had already at a very early time attempted to do away with the tying up of human labour for an unduly long period. The rule in Exod. xxi. 4 imposed upon the master of a slave who refused to go free in the Sabbatical year the duty to bore the slave's ear through with an awl and to make him his servant. This rule could perhaps have served as a dogmatic justification for lifelong service contract. In fact, however, it was explained in a way which made such use impossible. It was taken to mean a condemnation of the slave's sinful refusal to accept the liberty offered by the Sabbatical year.[3] As to the free hired workman (*sachir*) the rule which limited the period of his service to three years was admitted to be a *lex imperfecta*, the violation of which did not entail any worldly sanction.[4] No such sanction was, however, needed in view of another rule which in the Talmud is stated upon the authority of Rab (A.D. 175–247), and which is perhaps unique in the world history of law. According to this rule, every free hired servant may repudiate the contract which binds him towards his master (*baal ha-bayit*) at any time—even in the middle of a day. The purpose of this startling rule was to make sure that a workman's liberty should not be restricted by contractual obligations towards his master. The rule in the Talmud is derived from Lev. xxv. 55: "It is written: For unto me the children of Israel are servants. They are my servants but not the servants of my servants."[1] The servant's right to revoke the contract cannot be excluded by contract between master and servant. Its exercise terminates the contractual relations between the parties without any liability being imposed on the servant. This at least is the rule. There are some cases in which the servant is liable in damages to the master, but their scope is narrow and the servant's liability is confined to the amount of his unpaid wages.[2]

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[1] This hypothesis finds some support in Cod. Hammurabi, rule 117, which orders that if a man contracted a debt and sold his wife, son or daughter or gave them to work it off, " for three years they work in the house of their buyer or exploiter and in the fourth year he shall restore them to their former condition." See S. A. Cook, *The Laws of Moses and the Code of Hammurabi* (1903), p. 161, 229 ; D. H. Mueller, *Die Gesetz Hammurabis* (1903), p. 31 (text and translation) and pp. 110 *et seq.* ; Jeremias, *Moses and Hammurabi* (1903), p. 31.

[2] See Herzog, *Main Institutions of Jewish Law*, vol. i (1936), p. 45 ; Krauss, Art. " Slavery " in *Jewish Encyclop.*, vol. xi, p. 403.

[3] See Raschi, Comm. on Ex. xxi. 4 (Engl. ed. by Rosenbaum and Sittermann, vol. ii, p. 1086). For an historical explanation see Cook, *loc. cit.*, p. 165.

[4] M. Silberg, *Dienstvertrag und Werkvertrag im talmud. Recht* (thesis, University of Frankfort-on-Main, 1927), p. 20 ; Herzog, *loc. cit.*, pp. 381 *et seq.*

Roman Law and its Modern Followers.—On the development of modern laws on contracts of service Jewish law remained without any influence. On the Continent until the end of the eighteenth century Roman law in its modernized form was dominant. This fact alone makes comprehensible the absence of criticism of that strangest of all legal conceptions: the *locatio conductio operarum*. In the eyes of a Roman lawyer the contract of service is a special kind of letting and hiring: the letting and hiring of human services, which, save for a few slight differences, is governed by the same rules as the letting and hiring of a house or a chattel.[3] There is, of course, no reason why the law should prevent a man from letting his house or one of his chattels to another man for his or the other party's life or from letting it to him for one hundred years or even for ever. On the contrary, such contracts are, of course, frequently met with and, when once contracts of service have been assimilated to contracts for letting and hiring, lawyers seem to have lost the power to perceive anything strange in contracts of service for life or for fifty years. Even authors of the "natural law" school submitted to the influence of Roman law and saw no objection to classifying contracts for service together with contracts for the hire of moveables. In consequence they failed to see sufficient reasons for developing rules to protect the servant.[1]

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[1] Talm. Babl., Baba Mezia Fol. 10*a* (Soncino ed., B.M. I, p. 53); Baba Kamma Fol. 116*b* (Soncino ed., B.K. I, p. 694); Baba Mezia Fol. 77*a* (Soncino ed., B.M. II, p. 445). Kohler, *Darstellung des talmudischen Rechts in* Lazarus Goldschmidt, *Die rechtswissenschaftl. Sektion des babylon. Talmuds* (1907), vol. ii, p. 215; Silberg, *loc. cit.*, p. 33 *et seq.*; Farbstein, *Das Recht der unfreien und freien Arbeiter nach jüdisch-talmudischen Recht* (1896), pp. 59 *et seq.* Kohler's view, that the only consequence of the right of revocation was to make an execution of the master's claim for services impossible, not to exclude liability for damages on the part of the servant, is not borne out by a correct interpretation of the texts. See Silberg, *loc. cit.*, pp. 35 *et seq.*

[2] Silberg, *loc. cit.*, pp. 35 *et seq.*

[3] Prof. Schulz, in his *Principles of Roman Law* (1936), p. 68, says quite rightly that this conception is due to that characteristic Roman tendency to simplify the basic notions of the legal system which has given to the Roman legal system such impressive clarity of structure. Without doubting the existence of this tendency, it should, however, not be overlooked that this may be an instance of one of those cases where the influence of language has been instrumental in producing or furthering an idea, *locatio-conductio* simply meaning the "placing" of something and its being "taken away" by the other party. See Jolowicz, *Histor. Introd.*, p. 304, n. 1. With regard to its conception of contracts for service Jewish law is obviously much more in conformity with Germanic conceptions, on which see O. v. Gierke, *Die Wurzeln des Dienstvertrages*, Berliner Festgabe für Brunner, 1914, pp. 37 *et seq.*, than certain modern German writers are prepared to admit. On the other hand, in Muhammadan law the "letting and hiring of services" is grouped with the letting and hiring of chattels as *ijara*. See Vesey-Fitzgerald, *Muhammadan Law*, 1931, p. 186; Sachau, *Muhammedan. Recht nach schaffitischer Lehre*, 1877, p. 545. In modern French law the tendency is to break away from the Roman classification. See *e.g.* Planiol, *Traité pratique de droit civil français*, vol. xi (1932), p. 6.

In the *usus modernus pandectarum* as in force in many parts of the Continent until comparatively recent times the majority of learned authors upheld the validity of such contracts so long as the then dominant legal system continued to prevail. A few objected and pointed to the commandments of Christian morality and even to an obscure text in Justinian's Code.[2] But the *communis opinio* was against them, and it cannot be doubted that they could find convincing arguments in the Roman texts.[3]

Although it was impossible for a free man to subject himself to servitude by contract with another man, the *auctoramentum*, *i.e.* the agreement between the gladiator and his principal, came very near to such submission and influenced even the status of the gladiator in various respects.[4] In the later law semi-slavish conditions became more and more important. It is one of the most striking tendencies of Byzantine law that even free persons might be bound to serve for certain purposes for all their lives and sometimes for the lives of their descendants too. A

[1] See, *e.g.*, Achenwall, *Prolegomena iuris naturalis* (1781), § 217; Kahrer, *Recht der Natur*, 1746, p. 524.

[2] See the quotations by Bonacossa, *Tractatus de servis vel famulis, quaest.* 6; Dorn, *Versuch einer ausführlichen Abhandlung des Gesindrechts*, 1794, pp. 177 *et seq.*; Pufendorf, *De iure naturae et gentium*, Lib. vi, cap. 3, § 7. The text in question is Cod. 7, 16, 10, which, however, does not refer to our question at all, but deals solely with an attempt by a free citizen to become a *servus* by *privatis pactis*.

[3] The texts usually quoted were C. 4, 65, 10, where a *locatio conductio perpetua* is mentioned, although the text does not exclude the possibility or even probability that a mere *locatio conductio rei* is referred to, and the texts referring to the *γεωργοί ἐναπόγραφοι*; cf. Kübler, *Geschichte des röm. Rechts* (1925), p. 348.

[4] See Coll. leg. Mos., 4, 3 and 9, 2. Jhering, *Geist des römischen Rechts*, vol. ii (7th ed.), pp. 221 *et seq.*, claims for the older law a strong tendency in favour of personal liberty and says that lifelong service contracts were alien to the spirit of the old law. D. 35, 1, 71, 2 which he cites is, however, scarcely sufficient evidence for this proposition, as it refers to quite different restrictions of personal freedom. The principle of *pecuniaria condemnatio*, to which he refers in the same connexion, is of too general character to be of importance for our special point. In his *Zweck im Recht* (3rd ed., pp. 107 *et seq.*) Jhering says: "It was considered dishonest to be paid for intellectual work. Only manual work was paid, for which reason it was despised. Wages (*merces*) render the work mere merchandise (*merx*)." It would appear that this attitude on the part of Roman society was not too favourable to provisions protecting the freedom of workmen. In any case the law "received" on the Continent was neither the pre-Classical law to which Jhering refers, nor the law of the Classical period, but that of Justinian.

constitution by Emperors Arcadius and Honorius of the year A.D. 398 went even so far as to order the arms of workmen serving in the State armament factories to be branded by stigmata *ut hoc modo saltem possint latitantes agnosci*.[1] That under the modern Romanized system the question could be discussed at all is a sure sign of progress.

The continental lawyer of the present day accustomed to find the problem dealt with explicitly in the text of his code will, however, be surprised to see how comparatively little attention has been given to it even in recent times. Among the authoritative books of Roman-Dutch law neither Grotius, nor van Leeuwen, nor Voët mention it, and modern South African works preserve this attitude.[2] The same is true of the German standard textbooks on the common law in force until 1900: the treatment of contracts of service in all of them is unduly short, and neither Hellfeld, nor Vangerow, nor Windscheid, nor Sintenis, nor even the more modern-minded Dernburg mention the matter.[3] We need to resort to monographs to ascertain the actual state of the law.

Scots Law.—It seems that Scots law is the only one among the modern systems directly based on Roman law in which our question has received a more adequate treatment. It was brought before the Scottish courts first in 1632 in *Laird of Caprington* v. *Geddew*.[4] There a collier had given his bond to work at the Lord of Caprington's coal heughs " during all the days of his lifetime." It was alleged that the bond was made *contra bonos mores* and Christian liberty," but the court was not prepared to follow this argument and found that it was lawful. One hundred years later, in *Allen and Mearns* v. *Skene and Burnet*[1] the tacksmen of fishing-boats entered into a contract "by which they became bound for the space of three nineteen years . . . to be as *adscriptii* or *villani* astricted continually to their respective boats, so that none of them . . . could remove from the village . . . or . . . from one boat to another." This time the court was more open to pity than in *Geddew's case* and the contract was "reduced as being too great a restraint upon natural liberty." In a more recent case, *Stewart* v. *Stewart*,[2] Lord Tayner said: "No man can bind himself in service to another for his whole life," but as Professor Gloag rightly remarks[3] this is an *obiter dictum.*

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[1] Cod. XI, 10, 4; Kübler, *loc. cit.*, p. 346. Modern German industrial law seems to achieve similar results by somewhat different, but perhaps not much less effective means. Skilled workmen in the metal and kindred industries must not be employed in any other capacity than that for which they have been trained (see decree of Nov. 7, 1936, *Reichsanzeiger* Nr. 262); firms are forbidden to engage workmen who were not on January 15, 1935, domiciled in the district where the firm is carrying on business except with the permission of the labour authorities, thus making the workmen virtually *adscripticii* (decree of December 29, 1934, *Reichsanzeiger* Nr. 2); no workman can be engaged who is not in possession of an official " labour book " (*Arbeitsbuch*, statute of February 26, 1935), and the employer is entitled to retain this " labour book " in case of an " unjustified premature termination of the service agreement by the workman " (decree of December 22, 1936, *Reichsanzeiger* Nr. 299). Emigration is prevented by various administrative measures.

[2] Grotius, *Inleiding* III, 19, 8; Voët, *Comm.* 19, 2, 6 *et seq.*; van Leeuwen, *Comm.* c. XXII (Engl. ed. by Kotzé, vol. ii, p. 174); Nathan, *Common Law*, vol. ii, p. 792; Maasdorp, *Institutes*, 4th ed., vol. iii, pp. 276 *et seq.*; Pereira, *Laws of Ceylon* (1913), pp. 680 *et seq.*

[3] Hellfeld, *Jurisprudentia forensis*, ed. nov. by Oeltze (1768), pp. 368 *et seq.*; Vangerow, *Lehrbuch der Pandekten*, 7th ed., vol. iii (1876), p. 460; Windscheid-Kipp, 9th ed., *Lehrbuch* II, § 402; Sintenis, *Das praktische, gemeine Recht*, 3rd ed., vol. ii (1868), p. 677; Dernburg, *Pandekten*, 1st ed. (1880), p. 295. See further Riezler, "Arbeitskraft und Arbeitsfreiheit in ihrer privat rechtl. Bedeutung" in *Archiv für bürgerliches Recht*, vol. xxvii (1904), p. 222; Motives German Civil Code, p. 466 (reprinted in Mugdan, *Materialien*, vol. ii, p. 259). By this time the Roman sources say very little about the *locatio conductio operarum*, the reason, of course, being that in the Classical age most of the work was done by slaves (Buckland and MacNair, *Roman Law and Common Law*, p. 226). The lack of interest shown by the pandectists in the contract of service is obviously caused by the fact that they could not find much material in their sources.

[4] M. 9454, No. 4.

As against *Allen and Mearns' case* there stands the authority of Erskine.[4] In his view "it is hard to conceive how an engagement . . . which is to last for life is more inconsistent with liberty than one which is to expire after twenty or thirty years. And there appears nothing repugnant either to reason or to peculiar doctrines of Christianity, in a contract by which one binds himself to perpetual service under a master who, on his part, is obliged to maintain the other in all the necessaries of life (Grot., *De jure belli*, L. 2, C. 5, § 27)."[5] We shall see later how modern legislators have removed the objection made against the validity of long-term service contracts. As to the question of moral repugnancy, had Erskine written fifty years later than he did, he would have found considerable difficulty in meeting with a continental author to endorse his view.

There is one more case[6] in which our question came before the Scottish courts, but the Court of Session held it to be of no importance for the actual decision and so avoided giving any ruling upon it. The case is, therefore, of no avail one way or the other, and the attention paid to it by several modern textbook writers[7] is not justified. In Scots law the question must be considered as still open.

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[1] M. 9454, No. 5.

[2] 1 F. 1158, on p. 1170.

[3] Gloag, *The Law of Contract*, 2nd ed. (1929), p. 568.

[4] *Institutes* (first published 1754), i, 7, 62.

[5] This text from Grotius, quoted by Erskine, is (slightly shortened) as follows: *nihil habet in se nimiae acerbitatis: nam perpetua ista obligatio compensatur perpetua illa alimentorum certitudine, quam saepe non habent, qui diurnas speras locant.*

[6] *Mulcahy* v. *Herbert*, 25 Rettie (1898), 1136.

[7] Trotter, *Law of Contract in Scotland* (1913), p. 215; Bell, *Principles of the Law of Scotland*, 10th ed., by Dr. W. Guthrie (1899), p. 78; Green's *Encyclopedia of the Law of Scotland*, vol. v, p. 316, *Encyclopedia of the Law of Scotland*, vol. vii (1929), p. 599. In *Mulcahy's case* a nun's agreement with her monastery was considered to be a contract by which the nun bound herself in return for perpetual maintenance to serve the monastery during all her life. In the Court of First Instance Lord Kincairney took a decidedly unfavourable view of the plea of illegality, basing his opinion on Erskine, *Wallis* v. *Day* (see above, p. 45), and Sir Frederick Pollock's statement of English law. The two older Scottish cases were obviously not con-

Modern Continental Laws.—In the history of modern continental laws the turn came as a result of the French revolution. All modern continental codes follow the example set by the French Civil Code and thereby are disciples of the French revolution. The merit of having made lifelong service contracts impossible for the first time in modern times belongs to the French constitution of June 24, 1793, from which it was later taken over into the Civil Code.[1] The Prussian Allgem. Landrecht of 1794 merely contained the rather mystical clause :

> Zur Sklaverei oder Privatgefangenschaft kann Niemand durch Willenserklärungen verpflichtet werden.

It is obvious that this rule was of no practical importance : when in 1810 the emancipation of Prussian peasants took place, special Government decrees were needed to limit the duration of service contracts between agricultural workmen and their employers to a maximum of twelve years.[2] Art. 1780 of the French Civil Code provides as follows :

> On ne peut engager ses services qu'à temps ou pour une entreprise déterminée.

It is this rule which since 1804 has been the model for an astonishing number of similar provisions in other codes. The Italian, Spanish, Dutch, Canadian, Portuguese and even the modern Soviet Russian code,[3] all follow—some with a few variations—the same phraseology. In France it is repeated in the *Code de travail* of 1910.[4] Such alterations

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sidered. Among modern textbooks only comparatively few hold what, it is submitted, is the right view, viz. that the question in Scots law is still open. See Gloag, *loc. cit.* the 21st ed. of Erskine's *Principles* (by J. Rankine), p. 383, and Gloag and Henderson, *Introduction to the Law of Scotland*, 2nd ed. (1933), p. 211, n. 9.

[1] Boileau, *Des restrictions à la liberté des contractants dans le contrat de travail* (thèse, Paris, 1908), p. 20, says that the rule of Art. 1780 is already contained in the *Déclaration des droits de l'homme* of 1789, and Professor Hedemann, in his *Fortschritte des Zivilrechts im* 19. *Jahrhundert*, vol. i, 1910, p. 32, repeats this statement, adding that the respective rule is to be found in Art. 15 of the *déclaration*. This is a surprising error. Art. 15 has no relation whatsoever to our question, and the *déclaration*, as well as the older American Bills of Right, confine themselves to mere theoretical postulates regarding human liberty. As Professor Riezler, *loc. cit.*, p. 219, rightly remarks, the Virginian Bill of Right did not place the slightest difficulty in the way of the continuation of slavery in Virginia. It may be that the mistake is caused by Art. 15 of the preamble to the constitution of 5 fruct. an III, which repeats the rule of the 1793 constitution. Art. 15 of the loi du 21. germinal an X reads as follows : *L'engagement d'un ouvrier ne pourra excéder un an, à moins qu'il ne soit contre-maître, conducteur des autres ouvriers ou qu'il n'ait un traitement stipulé par acte exprès.* The last-mentioned exception shows that this Act did away only with *certain kinds* of long-period service contracts.

[2] Edikt of September 14, 1811, § 7, Gesindeordnung of November, 8, 1810, § 40. See Dernburg, *Lehrbuch des preussischen Privatrechts*, 4th ed. (1884), vol. 1, p. 172.

[3] It. cod. civ., Art. 1628 ; Span. cod. civ., Art. 1580 ; Dutch Burg. Wetb., Art. 163 ; Soviet Russian Code of Labour, Art. 34 ; Canad. Civil Code, Art. 1667 ; Portug. cod. civ., Art. 1867. For Bulgarian Law, see Schöndorf, *Einführung in das geltende slavische Recht*, vol. i, p. 113.

[4] *Code de travail*, December 28, 1910, Art. 10.

as have been introduced by other modern legislatures refer to questions of technique and leave the principle as such untouched. This is so, although some modern legal systems, namely those of Germany, Switzerland and Austria, deviate from the French Code as regards one point which *prima facie* may seem to be of first importance: they do not avoid lifelong service contracts, but confine themselves to allowing the servant to terminate the contract after the expiry of a certain period from the time when the contract was concluded.[1] The advantage thus obtained over the French rule is twofold.

Firstly, long-period service contracts are reduced to a reasonable measure. The discrepancy existing if it is forbidden to a man of 80 years of age to bind himself for life, while a man of 25 years can very well be bound for thirty years or more, is done away with. In consequence, attempts to circumvent the prohibition of lifelong service contracts are made more difficult, if not wholly impossible. The practice of the French courts shows that such attempts are made from time to time, and the French courts have been forced to create a number of rules of doubtful value. It has, *e.g.*, been held in France that contracts for the life of the employer or of a third party are invalid as contrary to Art. 1780, if it is probable that the employee will not survive the employer or the third party, *i.e.* especially if he is younger than they. In France long-period contracts are valid, save where the period is so long as to embrace the whole probable duration of the servant's life.[2] The modern formulation of the rule dispenses with these more or less artificial distinctions and replaces them by a clear-cut time limit.

Secondly, French courts have found difficulty in regulating the payment for services already rendered under the void agreement. It is clear that the servant cannot claim his contractual wages, as the contract itself is avoided by Art. 1780. On the other hand, services have been rendered and accepted and a claim for wages can be based on an implied contract. The question of the amount is, according to French doctrine, a question of fact, and it has been said that the judge, in fixing it, should not simply take the contractual amount as the basis of his decision, *car le prix été fixé en tenant compte soit des avantages, soit des inconvénients que pouvait offrir pour les parties un engagement perpétuel.*[3] To express these advantages or disadvantages in hard cash appears to be so difficult an undertaking that modern legislators have preferred to abide by the contractual amount of wages.

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[1] German BGB (1896), § 624; Austrian ABGB, § 1158 III (enacted by the 3. Teilnovelle of 1916); Swiss OR (1911), Art. 351 (but see before OR of 1883, Art. 345). The Brazilian cod. civ., Art. 1220, and the Finnish statute on industrial law (June 1, 1922), §§ 3–5, differ insofar as according to them any contract for service is deemed to expire after 4 or 3 years respectively from the time of its conclusion without notice on the part of the servant being required. The modern codes of China and Japan contain no rule restricting lifelong or long-period service contracts.

[2] See Aubrey et Rau, 5th ed., vol. v, no. 108; Baudry-Lacantinerie et Wahl, *Traité*, vol. xxi, no. 2869. For Canadian law, Mignault, *Le droit civil Canadien*, vol. vii (1906), p. 370.

[3] Baudry-Lacantinerie et Wahl, *Traité de droit civil*, vol. xxi, no. 2876; Cass de 28 juin 1887, S.87.1.380; D.88.1.296.

French Draft Rule compared with Central European Codes.—The advantages of this new formulation have been recognized in France. A draft submitted to the General Assembly of the Société des Etudes législatives, of April 27, 1928, reads as follows : [1]

> L'article 1780, § 1er, du Code civil et l'article 20, du Livre I, titre II, du Code du travail sont complétés par la disposition suivante :
>
> Le contrat de travail conclu pour plus de 5 ans peut, à partir de l'expiration de la 5ième année et nonobstant toute stipulation contraire, être résilié sans indemnité à la volonté de l'une ou de l'autre des parties contractantes moyennant un préavis de six mois.

At the meeting it was agreed to substitute a ten-year period for the period of five years, mentioned in the draft.[2]

Apart from this question of the extent of the time limit which has been variously dealt with, this French draft deviates in other respects from the German, Swiss and Austrian enactments.[3] The right to give notice is granted to both master and servant, not, as in the Central European legal system, to the servant only. It appears to be doubtful whether this is an improvement. The purpose of the rule is the protection of the workman's liberty, and there is no reason why this should be coupled with the grant of a legal advantage to the employer. At the meeting of the Société d'Etudes législatives the question was discussed[4] whether the doctrine of *abus de droit* would be sufficient to cover all cases of hardship arising out of the master's right to give notice. It seems that a good many cases remain where even, under the broad French rule of *abus de droit*, a right to give notice on the employer's side might work inequitably.

The other point in which it varies from the Central European codes is to be found in the second paragraph of the draft, which runs as follows :

> Dans le cas où le contrat de travail est conclu en vue d'une entreprise déterminée, dont la durée excède cinq années, l'exercice de ce droit de résiliation pour l'une des parties peut, s'il en résulte un préjudice pour l'autre, donner lieu au paiement d'une équitable indemnité.

This proposal may be approved, since it fills a gap left open in the German, Swiss and Austrian rules.

No speaker at the meeting of the French society recommended abolition of the rule contained in Art. 1780 c.c. Neither does it seem to have been suggested in any country following the French model or in any Central European country, that the legislator was wrong in making a firm stand against such contracts. There are some slight differences in the interpretation of their respective rules by the courts in Austria and Germany,[1] but they concern points of minor importance. The principle as such seems never to have given rise to serious criticism. It may appear to be open to question whether in view of this unanimity in continental legal systems English and American lawyers should not see their way to reconsider their attitude towards our question, which although not of paramount importance in practice, appears to be of some consequence on principle and on a principle which happily has been held more sacrosanct by Anglo-Saxon nations than in any other country.[2]

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[1] *Bulletin de la Société d'Etudes Législatives*, 1928, p. 141.

[2] *Bulletin, loc. cit.*, p. 146.

[3] In Switzerland it is ten years, in Germany five, in Austria five, in Brazil four, in Finland three.

[4] *Bulletin, loc. cit.*, pp. 146 *et seq.*

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[1] See Ehrenzweig, *System des österreich. allgem. Privatrechts*, vol. ii, pt. i (1928 ed.), p. 498.

[2] The question of long-time service contracts is, of course, intimately connected with the problems of the doctrine of restraint of trade. It would lead far beyond the scope of the present article if an attempt were made to outline the corresponding rules of continental law. It should, however, be pointed out that some foreign laws are equally strict or even stricter than the corresponding rules of English law. See German Commercial Code, §§ 74 *et seq.*; Swiss Code of Obligations, Arts. 356 *et seq.*; Austrian Statute of January 16, 1910, s. 36 (in force in Czechoslovakia as well); and on French law, Baudry-Lacantinerie et Wahl, *loc. cit.*, no. 1708, 1710.

MATRIMONIAL DOMICIL AND THE CONTRACT OF MARRIAGE.

[*Contributed by* RONALD H. GRAVESON, ESQ., LL.M., S.J.D.]

OVER the course of the past century a doctrine of matrimonial domicil has developed in connexion with the making of contracts of marriage, encouraged by the tentative approbation of certain courts in England and the United States of America. Although its name suggests some relationship with domicil, this doctrine is essentially a Civil Law conception of the law of contracts applied only by analogy to marriage. From time immemorial the Common Law has regarded husband and wife for most purposes as one person. As a logical consequence of this unity at law it was seen, with the gradual development of the doctrine of domicil in the Common Law, that for legal purposes their domicils must be considered the same; and this one domicil was, as a matter of course, that of the husband. It was predicated upon the essentials of residence and specific intention. English law knew of two kinds of domicil, the one founded on fact, the other based in the first place on legal fiction: they were commonly called domicil of choice and domicil of origin. The conception of a third kind of domicil, that not necessarily of either of the parties,[1] but one conditioned upon the future performance of a marriage ceremony; a domicil of hope, of desire, of sincere intention, a domicil of the uncertain future; a domicil, in short, unknown to the Common Law, was the matrimonial domicil introduced and sponsored by the Civil Law.

Its entrance into the Common Law appears to have been effected by means of a logical application of the rule in English and American law that the essential validity and interpretation of a contract are governed by the law of the place of performance,[2] and later, in English law, by the "proper law" of the contract, that usually intended by the parties.[3] Marriage was admittedly a contract, and the fact that it was something more made it no less contractual. Nor did the fact that it was a very exceptional kind of contract. In so far as parties intended the devolution of their property to be governed by a foreign law, no fundamental distinction could be maintained between marriage and any other contract affecting property. This fact, however, could scarcely justify calling the foreign law, with which neither party had then any necessary connexion, the law of a domicil. As a rule of the contractual and proprietary aspect of marriage the doctrine of matrimonial domicil was unobjectionable. But its extension in Scotland in the nineteenth century to found a basis of jurisdiction in divorce was never justifiable in the eyes of the English courts ; while its so-called foundation of jurisdiction in America is a claim to a jurisdiction based in reality upon actual domicil under the American law governing that conception.

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[1] English writers (*e.g.* Dr. Cheshire) take a narrower definition of matrimonial domicil as being aways the domicil of the husband at or immediately after the time of marriage.

[2] *The Byzantion*, (1922) 38 T.L.R. 744; *Robinson* v. *Bland*, 2 Burrow 1077; *Adams* v. *Robertson*, 37 Ill. 45; Dicey, *Conflict of Laws*, 5 ed., p. 645; Goodrich, *Conflict of Laws* (1927), pp. 228, 229.

[3] *Lloyd* v. *Guibert*, (1865) L.R. 1 Q.B. 115; *Jacobs* v. *Crédit Lyonnais*, (1884) 12 Q.B.D. (C.A.) 589; Dicey, *op. cit.*, p. 663.

The purpose of the present article, to the extent that it criticizes the doctrine of matrimonial domicil, is to examine practically the justification for the doctrine as based upon English decisions and, independently of those decisions, to consider the value of the conception of matrimonial domicil as a law to govern the essential requisites in the making of a marriage contract.

Definition of Matrimonial Domicil.—Three distinct kinds of definition exist of matrimonial domicil. The Civil Law usually understands it to mean the domicil which is contemplated or intended by the parties at the time of marriage. While this type of definition is supported by some eminent Civilians,[1] and is followed to a considerable extent in the United States of America,[2] it has found slight favour with English writers. Thus Dicey [3] defines matrimonial domicil as " the husband's actual domicil at the time of marriage," while Cheshire chooses for his definition " The place where the husband immediately after marriage retains or acquires a domicil," [4] but later, like his predecessor, asserts that " Matrimonial domicil means the domicil of the husband at the time of marriage." [5] With the merits and demerits of these definitions the present article is not deeply concerned. In favour of the first type of definition, however, it may here be pointed out that, if matrimonial domicil is to be anything but an intended domicil, it must be an existing domicil. The woman who intends to marry must therefore have, under the definition of matrimonial domicil as the domicil of the husband at the time of marriage, (*a*) her own operative domicil of origin or choice and (*b*) the domicil of a man who intends to become her husband. The solution to this seeming paradox, as will be shown later, lies in the facts that matrimonial domicil, in the first place, is not a true domicil, and the intending wife would not, therefore, be burdened with more than one domicil, her own ; and, secondly, that the so-called matrimonial domicil has reference not to the present, but to the future, namely, to the celebration and legal effects of a marriage ceremony not yet performed. It would seem that the Civil Law definition of matrimonial domicil as that contemplated by the parties at the time of marriage is sounder in law and logic than either of the other usual types of definition. The situation of the domicil of the parties after marriage differing from that of the husband at the time of marriage, conceivable in theory, has rarely occurred in fact. But in one English case, on the marriage in England of a British subject domiciled in England and a Turkish subject, the husband, domiciled in Turkey, the devolution of property settled upon marriage was held to be governed by English law, since the marriage had taken place only upon the faith of a promise of the Turkish husband to reside permanently in England after disposing of his Turkish property. The law of the matrimonial domicil which governed the devolution of the property was in this case the law of the place intended by the parties as the *situs* of the marriage. In a direct conflict of laws between that of the husband's domicil and that of the matrimonial domicil, the latter was held by Sir Charles Hall, V.C., to govern the settlement.[1]

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[1] Story, *Conflict of Laws*, 8 ed. paras. 191–9 ; Dicey, *op. cit.*, p. 598 ; Foote, *Private International Law*, 5 ed. p. 125.

[2] Story, *op. cit.* ; Jacobs, *The Law of Domicil*, para. 37.

[3] *Op. cit.*, p. 598.

[4] *Private International Law* (1935), p. 154.

[5] *Op. cit.*, p. 392.

Intended Domicil.—For America the doctrine of the intended domicil of the parties is well established in Louisiana, as might be expected in a State which has preserved so much of the Civil Law; though that fact greatly diminishes the value of the doctrine in its national significance. "The principle is well settled," asserted Justice Watkins, in *Re Succession of Hernandez*,[2] "that the matrimonial rights of the wife, who marries with the intention of removing into another state, must be governed by the laws of her intended domicile." In an earlier Louisiana case[3] Justice Martin, referring to the English decision in *Robinson* v. *Bland*,[4] directly applied the Common Law analogy of contracts to be governed by the law of the place of performance: "When a contract is made in reference to another country where it is to be executed, it must be governed by the laws of the place where it is to have its effect."[5] The contract to which Justice Martin was applying this analogy was that of marriage. He held that " . . . the matrimonial rights of a woman, who, as in the present case, marries with the intention of an instant removal, for residence in another state, are to be regulated by the laws of her intended domicil, when no marriage contract is made, or one without any provision in this respect." This view also finds favour in New Jersey. In *Harral* v. *Harral*,[6] for example, Justice Depue admits the Civil Law definition of matrimonial domicil in his words: "On the marriage, the legal presumption is that the wife takes the domicile of her husband, and her rights are subject to the law of his domicile; but that presumption is overcome, and the legal inference is superseded when, on the marriage, the parties adopt a place for their matrimonial domicile—in which event the matrimonial domicile will control, and will regulate the property rights of the parties in moveables."

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[1] *Colliss* v. *Hector*, (1875) L.R. 19 Eq. 334.

[2] 46 La. Ann. 962, at 990.

[3] *Ford's Curator* v. *Ford*, 2 Mart. (N.S.) 574.

[4] 2 Burr. 1077.

[5] *Ford's Curator* v. *Ford* (*supra*), p. 578.

[6] 39 N.J. Eq. 279, at 288.

The existing uncertainty amongst English writers as to the exact scope of the definition of matrimonial domicil may to some extent be explained by the unsatisfactory nature of the scanty Case Law upon it; and more plausibly by the attempt to fit a square Civil Law peg into a round Common Law hole. The fact, however, remains that matrimonial domicil should be an intended domicil, and on that account would not require to be exclusively the existing domicil of the husband at the time of marriage. Since in fact the intended domicil of husband and wife is usually the existing domicil of the husband at marriage, the tendency has been to define matrimonial domicil as the domicil of the husband. But the definition of matrimonial domicil as that which the parties by their choice of residence after marriage will acquire is based on broader grounds, and will embrace otherwise exceptional cases such as *Colliss* v. *Hector*, as well as being in accord with the Civil Law whence the conception came.

The definition of this peculiar kind of domicil as the intended home of the parties after their marriage is open to criticism on several grounds: our defects are clear.

(1) It attempts to constitute a relationship of domicil between two quite independent persons and a place without the necessary physical element of residence or presence. This objection, purely theoretical but no less fundamental, rests upon the fact that without residence matrimonial domicil can be no domicil at all. This is a strong objection to the claim of the so-called "matrimonial domicil" to that title. The word "matrimonial" cannot change the constituent factors of the conception of domicil: it can only describe the particular purpose to which domicil is being applied. The two essentials of domicil cannot, therefore, be dispensed with merely by the use of a descriptive addition. The objection is not against a conception which permits of the application to present facts of a law under which parties about to marry intend to live their married lives: it is against the description and application of such a law as the law of the domicil of the parties when in fact the parties are not domiciled within the jurisdiction of that law so that it may rightfully claim to control their personal acts.

(2) In its literal meaning of "the domicil of the marriage," the relation which matrimonial domicil represents is less between a person and a place than between the factual condition of marriage and the place where the rights and duties arising thereunder are performable.[1] Domicil is a legal conception of an essentially personal nature, be that personal element natural or legal. Persons alone may be said to be domiciled in any place, for domicil expresses the legal relationship existing between a person and a place. Domicil may certainly be predicated upon such a situation of fact as a marriage: it is not, however, the link binding the marriage as such to a place, but the legal tie through which the persons who have

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[1] *Jack* v. *Jack*, (1862) 24 D. 467, at 473, per Lord Deas.

married, and who alone are capable of owning rights and owing duties, are brought within the jurisdiction of the domiciliary law as their personal law.

(3) It fails to take account of the fact that domicil is a conception of law predicated upon actual residence and arises independently of the will or intent of the parties to acquire a domicil. The state of mind requisite to combine with actual residence in order to constitute a factual situation to which domicil may be applied is not an intention to acquire a domicil in a place, using the word " domicil " in its legal significance. The less of intention consciously to change one's personal law, as distinct from a mere change of residence for convenience, appears in a person's intention to reside indefinitely in another place, the more likely is that person to effect a change of personal law. A conscious effort to evade a more stringent personal law of one's actual domicil by an attempt to become domiciled elsewhere for a specific legal purpose, for example, divorce, will at once put a court upon suspicion : and this even though the court, like English courts, does not accept the doctrine of evasion of the law. Since the only apparent motive for change is for a specific and temporary legal purpose, no true *animus manendi* exists with regard to the new place of residence to justify the assumption of the acquisition of a domicil of choice in that place. While for English law the nature of the motive in changing one's residence is in itself no bar to a consequent change of domicil, it is material in showing whether the proposed permanent removal to another state or country is in fact genuine, or merely of sufficient duration to carry out the particular legal or other purpose intended.

(4) Either it must consider matrimonial domicil as no true domicil, but only as residence, or admit the possibility of the co-existence in one person of two operative domicils for the same purpose. Generally speaking, the English domicil of a natural person is the same for all purposes. With two statutory exceptions,[1] the earlier inoperative and unimportant, when one has acquired an English domicil for one purpose, that domicil is sufficient for any other purpose, whether testamentary, for legitimation, capacity to marry, divorce jurisdiction or otherwise. The position differs in American law. The American use of " domicil " has included conceptions other than and in addition to the strict legal meaning of the term. In that law " . . . the matter of the determination of any person's domicil arises in different ways and is construed by the courts for a variety of different purposes. . . . Definitions given in regard to the method of ascertaining the domicil for one purpose are not always applicable in ascertaining the domicil for another purpose. Some of the courts have made the broad assertion that a person can have only one domicil,[2] . . . while other courts have declared that a person may have a domicil

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[1] The Domicile Act, 1861 (24 & 25 Vic. c. 121) ; Matrimonial Causes Act, 1937, s. 13 (1 Ed. 8 & 1 Geo. 6, c. 57).

[2] *Farrow* v. *Farrow*, 162 Ia. 87 ; *Savage* v. *Scott*, 45 Ia. 130 ; *Love* v. *Cherry*, 2 Ia. 204.

at one place for one purpose and at another place for another purpose.[1] Confusion has frequently arisen because of a failure to distinguish between domicil and residence." The employment of the word "domicil" to denote different kinds of residence is responsible for this confusion. Story asserted that it had never been held that a person could have a domicil, in its technical sense, in more than one country at a time,[2] and this is the view very definitely taken by the American Law Institute.[3] Both English and American law are agreed that no person can have more than one operative and existing domicil for the same purpose. To insist that matrimonial domicil is in fact a legal domicil would lead to the conclusion that both the matrimonial domicil and the actual domicil of the person could co-exist as effective and operative domicils, and claim jurisdiction over the marriage in the essentials of its creation; and although advocates of the doctrine of control of the essentials in marriage by the law of the matrimonial domicil would exclude the claim of the actual domicils of the parties to such control, they would not deny to the law of the actual domicil exclusive control over other matters, *e.g.* intestate succession to moveables. The co-existence of two operative domicils, though for different purposes, would be inevitable. Dr. Cheshire himself, whilst advocating the theory of matrimonial domicil, joins the great body of writers in stating that no person can have two simultaneous and operative domicils.[4] If one finds it impossible to reject the latter principle, one is driven to deny to matrimonial domicil the qualities of a legal domicil and to conclude that, though it may constitute intended residence, it can be no more.

Control of Capacity to affect Status by the Proper Law.—Matrimonial domicil is essentially a conception of Civil lawyers for the regulation of marital property.[5] Its extension to determine the law which governs capacity to affect status and give jurisdiction in divorce may in part be justified only upon a somewhat tenuous analogy of the status, being a *res*, to the contractual treatment of immoveables, similarly a *res*. That analogy, however, is far from favourable to the control by the law of the matrimonial domicil of capacity to change the status, since capacity to make a contract respecting realty depends upon the *lex situs*, not upon the *lex domicilii* of the parties. But a more simple extension of the English doctrine of "proper law" from contracts relating to marital property to those relating to marriage itself would appear to have some theoretical justification, more especially in view of the increasing legal independence of the spouses, and particularly of married women, which has been such a notable feature of recent legal reform, and which appears to be a continuing and growing tendency.[1] As the "proper law" of a contract affecting personal property, the law of the country where parties intend performance is acceptable in English law, and, despite the territorial view of governing capacity to contract by the *lex loci contractus* as adopted in the American Law Institute's *Restatement of the Law of Conflict of Laws,* the doctrine of governing the essential validity of a contract by the place of performance is to-day accepted and followed in certain American courts.[2] On the other hand, to control capacity to affect status by the proper law is to treat that law as one of an existing and operative domicil. For although the matrimonial domicil, the "proper law" of the marriage contract, is usually the domicil of the husband, as has already been shown, it is not necessarily so, and may be that of the wife, or a domicil in some third state. The presumption is that it is the same as the domicil of the husband,[3] and raises a doubt, perhaps too academic, in the mind of the writer, as to whether one can justifiably base a doctrine of control of capacity to marry upon such a bare presumption.

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[1] *Smith* v. *Croom*, 7 Fla. 81; *Lan Ow Ben* v. *U.S.*, 144 U.S. 47.

[2] *Conflict of Laws*, 8 ed. p. 45: "The rules for ascertaining domicil admit of only one domicil at a time. In order to give any effect to the suggestion that a man may have different domicils for different purposes, the purpose for which reference is made to domicil, in cases of a conflict of laws, must be regarded as a single purpose. For this purpose he cannot have more than one domicil at the same time." (Bigelow's note.)

[3] *Restatement, Conflict of Laws*, (1934) Para. 11: "Every person has at all times one domicil, and no person has more than one domicil at a time."

[4] *Op. cit.*, p. 91.

[5] See Story, *op. cit.*, paras. 194–7.

Three different uses have been made of the term. It has been used in America as a test of the validity on grounds of jurisdiction of a divorce granted at the residence of one party, whether or not his or her domicil, without personal service of process on the other party:[4] in both England and America it has been used in the sense that the matrimonial domicil determines the rights of the parties in the moveable property of each other: and in its third sense as a criterion for governing the capacity of parties to enter into a marriage contract. Herein lies its closest relation to its original purpose. As the actual domicil of the husband is usually the intended domicil of husband and wife, it has been maintained that the law of the matrimonial domicil in this sense should be the personal law to control the capacity of the would-be wife to marry.[5] The basis of the argument for this view is that the country of the matrimonial domicil is interested, and alone is interested, in the validity of the marriage, and that the law of that country alone is entitled to pass judgment on the propriety or impropriety of the union. "The social life of England," it is written,[1] "is unaffected (by the marriage), for the girl loses her connexion with this country upon the acquisition of her husband's domicil." In over-emphasizing the view-point of the law of the matrimonial domicil, the argument fails to give adequate consideration to the fact that the country of the woman's pre-nuptial domicil has as great an interest as that of the husband's domicil in the control of the status, and of the capacity to change that status, of those who are there domiciled. For it is assumed that an unmarried woman is without question of value to the state in which she lives, of which she is a useful citizen, and to the social and economic resources of which she may contribute as a worker, as a householder, as a tax- or ratepayer; and ultimately, if married to a domiciliary of that state, as a mother. It may be that on marriage a woman takes from her husband a domicil other than her own, whereby the country of her new domicil alone is thenceforth interested in her status; but until her marriage she retains her old domicil, and the law of the place of that domicil would seem to have as much interest in preventing her marriage, if by its standards of public policy it considers such prevention necessary, as has the law of the matrimonial domicil in allowing it. The social interest involved in the formation of the marriage relation, if not as great as that in the perpetuation of the relation, is at least a matter of such importance as to demand the deepest consideration. In English courts the use of the expression "matrimonial domicil" has been confined to the marital interests in property, both moveable[2] and immoveable.[3] The term appears to have no meaning whatever for the Divorce Court.[4]

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[1] See, for example, the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30); Matrimonial Causes Act, 1937 (1 Ed. 8 & 1 Geo. 6, c. 57).

[2] *Adams* v. *Robertson*, 37 Ill. 45; Goodrich, *Conflict of Laws*, pp. 228, 229. See the remarks of Dr. A. M. Bartholdy in a paper on the Restatement read before the Grotius Society, December 5, 1935; *Proceedings of the Grotius Society*, 161 at p. 173.

[3] *Ford* v. *Ford*, 2 Mart. (N.S.) 578; Dicey, *op. cit.*, 598; *Harvie* v. *Farnie*, 52 L.J.P. 33, 8 App. Cas. 43: "The marriage is contracted with a view to that matrimonial domicil which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad." Per Selborne L.C., at p. 50. See *Harral* v. *Harral*, 39 N.J.Eq., 279.

[4] See Goodrich, 27 *Yale Law Journal*, 49.

[5] Cheshire, *Private International Law*, 1935, p. 154.

Brook v. Brook.—In this connexion, however, one cannot overlook the numerous references to the matrimonial residence made by Lord Campbell in the course of his judgment in *Brook* v. *Brook*.[5] This great decision upon the legality of a marriage celebrated abroad by persons domiciled in England and intending to make their home in England after marriage was given at a time when the conception of domicil in the Common Law was in its infancy. It is on that account of even greater interest to note the Lord Chancellor's continual association in his definitions of domicil of the actual domicil of the parties at the time of marriage with the place where the matrimonial residence is contemplated. His assumption throughout his judgment in *Brook* v. *Brook* appears to be that the two domicils will be identical. His mind was doubtless directed to the idea that the contract of marriage is an act of which the contemplated place of performance is the domicil of the parties, or at least of the husband. On the ground of the power of a state to prohibit the performance of illegal contracts within its territory, he therefore extends the provision, that a marriage invalid as to essentials by domiciliary law, but valid by the *lex loci contractus*, will be considered valid, only to those cases in which the marriage is invalid in essential particulars both by the domiciliary law of the parties at the time of the ceremony and by the law of their intended matrimonial domicil. While in practice the two domicils are usually identical, they are not necessarily so ; and the judgment of Lord Campbell cannot be taken simply as deciding that the law of the domicil alone governs essentials in a marriage. In five of the six places in his judgment in which the law of the domicil is expressly mentioned in this connexion, the Lord Chancellor associates both the present and the matrimonial domicils of the parties. In his short outline of the facts of the case before him, Lord Campbell describes the parties to the marriage as " British subjects then domiciled in England and contemplating England as their place of matrimonial residence " ; and continues in a consistent association of the two ideas. Thus he says, " . . . the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of marriage, and in which the matrimonial residence is contemplated " : and later, after emphasizing the importance to be attached in the cited case of *Warrender* v. *Warrender*[1] to the fact of Scotland being the conjugal residence, goes on to express his doubt that Brook's marriage would or ought to be held valid in Danish courts, " . . . proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined." Lord Campbell's judgment thus gives considerable justification for the theory that in English law the law of the matrimonial domicil of the parties governs their capacity to marry. *Brook* v. *Brook* thus becomes the foundation stone of both theories of control of the essentials in marriage, and from an unbiased approach one must admit that Lord Campbell's judgment is entirely in favour of combining the law of the matrimonial residence with that of the actual domicil of the parties in determining the essential validity of a marriage. The weakness of the decision in supporting the view of the law of the matrimonial domicil governing essentials in marriage lies in the fact that the Lord Chancellor's judgment, so favourable to this theory, represented but one member of a strong House of four Law Lords.[2] While the Lord Chancellor's judgment gave to the law of the matrimonial domicil some share in the control of the essentials in marriage, subsequent decisions[3] have not openly accepted the theory of joint control, and have thus impliedly detracted from this particular feature of the judgment in *Brook* v. *Brook*. In the somewhat similar decisions in *Sottomayor* v. *de Barros* (1),[1] *In re de Wilton*[2] and *In re Bozzelli*,[3] Dr. Cheshire has pointed out that "the parties had a common pre-marriage domicil, and in each that domicil was the matrimonial domicil."[4] In *Sottomayor* v. *de Barros* (1) the parties were domiciled in Portugal, and in so far as married children could be said to have any matrimonial domicil whatever, they continued to live after the ceremony with their parents in England. Their matrimonial domicil, if any, was not therefore the same as their pre-nuptial domicils. In his judgment in this case Phillimore speaks not of the law of the matrimonial domicil, but purely of the law of the domicil as governing capacity. Again, in *de Wilton's* case, in which a Christian girl and her Jewish uncle, both domiciled in England, had married in Wiesbaden in both civil and Jewish forms, the fact of their both being British subjects domiciled in England avoided their marriage. The decision was not based on domiciliary control of capacity to marry, but on non-compliance with English statutes[5] dealing with the forms of marriage of Jews and Quakers, and enacted at a time when marriage was still considered as governed entirely by the *lex loci contractus*, subject only to the long-standing Common Law exceptions of incest and polygamy. The decision was based chiefly on the fact of both parties being British subjects bound by English law. Beneath this reasoning, however, it is fairly clear that those two British subjects would not have been bound by English law had they not intended to return to England, establish a home and live there as man and wife. Although the reasoning is hypothetical, it is implicit in the decision. Of *In re Bozzelli* little need be said: let it suffice to quote the words of Swinfen Eady J., who gave the decision: "It is not disputed that the general principle is that the domicil of the parties governs the essentials of marriage."[6] If it is suggested that the "domicil of the parties" to which in this and other judgments reference is made means the matrimonial domicil of the parties,[7] it must be remembered that, for reasons given above, matrimonial domicil is no true domicil, and the presumption must therefore be against such a meaning, as well as by reason of the fact that the plural "parties," not the singular "husband," is used.

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[1] Cheshire, *op. cit.*, p. 155.

[2] *De Nicols* v. *Curlier*, [1900] 2 Ch. 410.

[3] *Ibid.*, [1900] A.C. 21.

[4] See *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 536, where the English authorities are reviewed.

[5] (1861) 9 H.L.C. 193.

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[1] 2 Cl. and F. 488.

[2] Campbell L.C., Lords Cranworth, St. Leonards and Wensleydale.

[3] *Sottomayor* v. *de Barros* (1), 3 P.D. 1 ; (2), 5 P.D. 94 ; *Warter* v. *Warter*, 15 P.D. 152 ; *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 536 ; *In re De Wilton*, [1900] 2 Ch. 481.

Mette v. Mette.—*Mette* v. *Mette*[8] has been cited in support of the theory that the law of the matrimonial domicil controls the essential validity of a marriage. The justification for this view must lie chiefly, as in *De Wilton's* case, as both cases involve the application of English law to British subjects marrying abroad, only in the assumption of their returning after the ceremony to live in England. Even with this assumption the decision could rest either upon a simple continuation of existing domicil or upon the other and less usual aspect of such continuation, namely, that the existing domicil also constituted after the ceremony a matrimonial domicil.

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[1] (1877) 3 P.D. 1.

[2] [1900] 2 Ch. 481.

[3] [1902] 1 Ch. 751: and, one might add, in *R.* v. *Dibdin*, [1910] P. 57, (C.A.) P. 101.

[4] *Op. cit.*, p. 159.

[5] 6 & 7 Wm. IV, c. 85; 3 & 4 Vic. c. 72; 5 & 6 Wm. IV, c. 54.

[6] [1902] 1 Ch. 751, at 753.

[7] See Cheshire, *op. cit.*, p. 160.

[8] 1 Sw. and Tr. 416.

Sottomayor v. de Barros.—In favour of the control of the essential validity of the marriage contract by the law of the matrimonial domicil the facts, though not the *ratio decidendi*, of the case of *Sottomayor* v. *de Barros* (2)[1] are sometimes invoked.[2] In that well-known case a marriage had been performed in England between the husband, who was domiciled in this country, and the wife, whose pre-marital domicil was Portuguese. By that domiciliary law the wife was incapacitated from marrying her husband, who was her first cousin. The marriage was nevertheless upheld. These facts in themselves would justify the theory of the essential validity of marriage being governed by the law of England, the law of the husband's domicil and incidentally the law of the domicil which the parties would have after their marriage. In the first place, however, the conventional and " inelegant " theory exists, based largely upon this decision, that the incapacity of one party under the law of his or her domicil to contract marriage with the other party, such incapacity being in kind or degree unknown to English law, will not prevent the formation of a valid marriage in England in English form if the other party is domiciled in England and has capacity to marry under that law. Few would take more pleasure than the writer in conducting a post-mortem examination of this insular doctrine, so unfortunately inconsistent with the principle of *Mette* v. *Mette*, were only the doctrine unquestionably defunct. One must admit, however, that the doctrine is still very much alive, thanks to the influence of a strong body of writers and judges, formidably led by Dicey himself. In the second place, far more important than the foregoing reason, a consideration of the full facts of *Sottomayor* v. *de Barros* (2) will hardly support the theory of a matrimonial domicil, namely, that the law of England should govern capacity to marry, since England was to be the country of the matrimonial home. Such a *ratio decidendi* is at once more acceptable and more equitable than the " non-recognition " theory ; but the facts of the case scarcely justify such a desirable conclusion. There is no material mention of England as the matrimonial residence of the parties. In this respect the case differs vastly from *Brook* v. *Brook*.[3] Where that case contained continual reference to " the law of the country in which the parties are domiciled at the time of marriage, and in which the matrimonial residence is contemplated,"[4] one finds in the *Sottomayor* cases no reference to the association of these two laws. Neither is there any material reference to the fact that the parties intended to make their home in England. In point of fact, such could hardly be the case, as the alleged husband and wife were only children when they married, and had no intention of making a home in England, in Portugal or elsewhere. Each continued to live with parents as before the ceremony. The marriage was intended chiefly as a convenient financial arrangement between the parents of the parties. There seems, therefore, too little justification in the case for a theory of decision based upon matrimonial domicil. It may be that the policy in favour of marriage worked more potently, as well as silently, within the mind of the President. It remains, nevertheless, a regrettable inconsistency that Hannen did not by analogy follow *Mette* v. *Mette* in giving to a foreign prohibition the same effect as to the English prohibitions in the earlier case.

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[1] (1879) 5 P.D. 94.

[2] Cf. Cheshire, *op. cit.*, p. 160, describing this case as " a clear authority for the view now being advocated."

[3] (1861) 9 H.L.C. 193.

[4] *Id.*, per Campbell L.C.

Chetti v. Chetti.—Thirdly, *Sottomayor* v. *de Barros* (2) was followed by *Chetti* v. *Chetti*.[1] In *Sottomayor* v. *de Barros* the wife had been incapacitated under her foreign domiciliary law from marrying her cousin in England where, if anywhere, the matrimonial domicil would have been located. The facts in *Chetti* v. *Chetti* were the reverse : the husband was under the incapacity by his foreign domiciliary law, but marrying in England under his wife's law, his incapacity was disregarded and the marriage upheld. In both cases the incapacity was one inoperative under English law : in the first case the parties continued to live in England, and in the second both continued and intended so to do, so that England might justifiably be called their matrimonial home. The theory of the validity being governed by the law of the matrimonial domicil is, in the first case, justified only on the unjustifiable assumption of the existence of an intentional or factual adoption of England as the home of the marriage : in the second only by broadening the definition of Cheshire, which refers the question exclusively to the husband's domicil, to embrace the domicil of the wife in cases where the intention of the parties is to live as man and wife in the country of the wife's domicil. The first alternative is impracticable ; the second probably unacceptable to the supporters of the matrimonial domicil theory, who base their definition, following Savigny, upon " . . . the domicil of the husband, who, according to the laws of all nations and of all times, must be recognized as the head of the family."[2] On the whole, the cases of *Sottomayor* v. *de Barros* (2) and *Chetti* v. *Chetti* seem regrettably to fit what has been referred to above as the conventional theory far better than the theory of control by the law of the matrimonial domicil.

Objections against Matrimonial Domicil.—As a theory of law to govern the validity of marriage the doctrine of matrimonial domicil, like the English doctrine of the " proper law " in contracts, has much to commend it. One feels strongly that the proposition set forth with such skill by Dr. Cheshire is the saner and sounder rule in the eyes of John Citizen, even as it is more favourable than pure domiciliary control to his individual interest in freedom of contracting. But its acceptance involves two consequences which, as has been already indicated, merit some consideration: the fact that a personal law is invoked which is not the law of a true domicil; and the disregard of the interest of the state of the woman's domicil in her change of status by marriage. The objections maintainable against matrimonial domicil are justified by the fact of its assuming to be a kind of domicil while failing to possess the combination of factors essential for a valid claim to that conception. Not entirely theoretical is the claim that the conception of domicil and its essential factors be kept clear. Provided that some compromise could be achieved to employ the doctrine while taking account of the social interest of the state of the woman's domicil, it is surely not unreasonable, in the working out of the individual and family lives of two people, to govern their capacity to marry and the essentials of their marriage by the personal law under which they intend to live, though perhaps illogical in according to that law a retrospective operation. Herein chiefly lies the reason which commends the doctrine of control by the matrimonial domicil. The future may justify its acceptance: but past decisions adduced in its support are at the most, with one or two very doubtful exceptions, only equivocal for one theory or another.

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[1] [1909] P. 67.

[2] Savigny, *Private International Law*, s. 379, cited in Cheshire, *op. cit.*, p. 155.

Primary Obstacle to a Universal Rule.—Leaving aside for a moment the theories of control of the essentials in marriage deducible from English judicial decisions, it may not be out of place at this point to attempt one or two suggestions of a constructive character.

The primary obstacle to a simple, universal rule lies in the fact, as pointed out by Cresswell J. in *Mette* v. *Mette*,[1] that "There could be no valid contract unless each was competent to contract with the other." The attempt of the conventional theory of control of essentials to overcome the patent objection to the reference of capacity to the law of each party's domicil has taken the form of a disregard of un-English domiciliary incapacities, and is theoretically not very acceptable. It appears to be of first necessity to select one law, as the advocates of the matrimonial domicil have done, to govern capacity to marry. Further, it is clear that such selected law should be that of a system truly and universally common to the parties. The matrimonial domicil possesses both of these features: objection to it is based on other grounds. The obvious alternative of a reversion to the pre-domicil rule of governing marriage both in its formal and essential validity by the law of the place of contracting may be thought to preclude necessity for further consideration. But the very simplicity of the theory of *lex loci contractus* has, at least in the United States of America, betrayed its impracticability. As in that country, so in England, the adoption of the theory would almost certainly entail the establishment of a compensatory and corrective doctrine on the lines of evasion of the law which, as the writer has tried to show,[2] bears such a close resemblance to the English doctrine of domiciliary control that the theoretical distinctions are for practical purposes not of great importance. To return to the old Common Law rule of *lex loci contractus* in its pure form would be the least artificial simplification of the problem, but would leave unrecognized two important social interests : that of the state of the woman's domicil in her change of status, and that of the state of the matrimonial domicil in maintaining its own accepted standard in domestic relations.

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[1] 1 Sw. & Tr. 416, at p. 423.

[2] "The Doctrine of Evasion of the Law in England and America," *Journ. Comp. Leg.*, Third Series, vol. xix, pt. i, p. 21.

Social Interest of the State of the Woman's Domicil.—It is clearly impossible, however, for all conflicting interests, social and individual, in any matter to be fully realized in this imperfect world. A practical compromise of a theoretical conflict of interests is the Common Law's solution to many paradoxical problems. The matter here discussed presents a conflict of social interests between the state of the woman's pre-nuptial and that of her post-nuptial domicil. Where reconciliation is so difficult, it seems better to try to discover the more important interest to be secured, and to compromise by disregarding the less important to the extent required for giving full effect to the greater interest. Applying this reasoning to the problem under consideration, it would seem that the social interest of the state of the woman's post-nuptial domicil in securing her marriage under essential conditions acceptable to its own community, in controlling from start to finish her personal capacities throughout her married life under its law, in maintaining the accepted standard of domestic morality among those living within its community, is much stronger than the corresponding interest of the state of the woman's pre-nuptial domicil. That interest cannot claim post-marital rights. It is important in deciding whether a domiciliary of the state should be allowed to marry a certain person domiciled in another state. Beyond that point, however, the interest of the state of ante-nuptial domicil is not of importance. The doctrine of control of capacity by the law of the matrimonial domicil has the advantage of securing the greater interest with the least sacrifice of the smaller. Independently of these two conflicting social interests exist the interests of the individuals most intimately concerned in the matter : interests in the freedom of contracting marriage. Under the conventional doctrine of control in English law two domiciliary laws have usually to be satisfied as to compliance with essentials, though these two laws are frequently identical : under the doctrine of control by the law of the matrimonial domicil one law alone demands compliance in the same essential requisites. The latter theory, for that reason, secures a greater degree of personal freedom of contracting, and may on that account be thought twice blessed. Individual freedom of contracting marriage is, moreover, a more powerful interest in a democracy than in a totalitarian state, where the interest of the state is made to override all personal liberties.

Changes advocated in the Theory of Matrimonial Domicil.—The theory of matrimonial domicil has not been criticized wantonly or in vain. If it is to be accepted as a doctrine of control of the essentials in marriage, two fundamental changes must be made.

(1) The marriage contract must be entirely separated from the resultant status of husband and wife conferred upon the parties so that, while the formalities of the ceremony continue to be governed by the *lex loci contractus*, the essentials now become governable by the law of the matrimonial domicil. No question of status has yet arisen. In this case, as in American law, the contract as a whole may exist without the status of husband and wife of necessity being conferred upon the parties. For matrimonial domicil is not, properly speaking, a domicil at all, and therefore cannot control the acquisition of a status. Status can alone be conferred, if we are to keep legal theory reasonably logical and relatively pure, by the law of the domicil. However, when the parties, after marriage according to the above formula, become domiciled in fact in the state whose law they have followed in the essentials of the contract, they may rightfully demand that that same law, now a true law of their common domicil, shall accord to them the status of husband and wife. This granting of the status would in most cases be automatic and implicit in the residence of the parties as man and wife within a state. In this way the essentials of the marriage contract are governed by the law of the intended place of performance of the contract, which is not necessarily the law of domicil of either party, and the status accorded by that same law when it has actually become the law of the domicil of both parties, and therefore recognized as exclusively competent to adjudicate upon matters of status. There is little cause for fear that this proposed change would create a legal situation such as obtains in the United States, where the whole contract is governed by the *lex loci contractus*, the state of the domicil of the parties at the time of marriage reserving to itself the right to grant or withhold the marital status. It will not, therefore, constitute a situation necessarily demanding the introduction of a corrective theory on the lines of the American doctrine of evasion of the law of the domicil. In American law no essential connexion exists between the place of contracting and the domicil of the parties. There is, therefore, no assurance under that law that the status will be predicated upon a contract validly celebrated outside the domiciliary state. In the theory suggested above, on the other hand, the compliance in essentials with the law of the proposed marital residence constitutes a reasonable assurance that the same law will confer a full status when the parties after marriage acquire a domicil under it.

(2) The second necessary change is consequential on the first: the name of matrimonial domicil, being a legal misdescription, should be changed to that of marital (or matrimonial) residence. Matrimonial domicil should be reserved for use only to describe the domicil of the married pair when, and not before, they are married, and have acquired a common domicil. This proposed change has been fully dealt with in the preceding criticism of matrimonial domicil.

The acceptance into English law of the doctrine so briefly outlined above would be advantageous in several respects. In the first place, it would lead to greater simplicity and certainty in the all-important question of what essentials must be fulfilled. The only apparent difficulty here would be that of the characterization or qualification of certain requisites under different legal systems as essentials or formalities. Secondly, it would place the contract of marriage upon a more rational basis in a closer approach to historical tradition ; for that contract was formerly governed entirely by the law of the place of making. Thirdly, a greater quantity and degree of interests, social and individual, would be secured by the adoption of the doctrine than are secured by the present English doctrine. If one sees the end of law as the securing of the maximum of human interests, this is a very substantial advantage of the theory. Finally, a number of lesser consequential advantages might be mentioned, such as the unwept demise of the present inelegant conventional English theory of control of the essentials in marriage, and the redirection to the narrow way of truth of the errant doctrine of matrimonial domicil.

THE NEW CRIMINAL CODE FOR PALESTINE.

[*Contributed by* NORMAN BENTWICH, Esq., O.B.E., *sometime Attorney-General for Palestine.*]

Ottoman Codes.—The law of Palestine, it has been said, is not Mosaic, but a mosaic. At the time of the British Military Occupation of the country in 1918, the Ottoman codes and laws were in force. They included a Penal Code, a Commercial Code and Codes of Civil and Criminal Procedure which had been introduced in the middle of the nineteenth century, as the result of a sudden ardour for modernizing and codifying the law which had seized on a reforming Sultan. All these codes were derived from Napoleonic models which were accepted as the exemplar of legislation throughout the continent. The Penal Code showed, however, a few traces of the Moslem principles. It provided, for example, for the payment of *Diyet* or blood money to the kin of the victim, where death was caused either wilfully or by negligence[1]; but generally and broadly it was a translation, if an unfaithful and inaccurate translation, of the French texts as they stood in the middle of the nineteenth century. From time to time there were amendments by decree of the Sultan; but they did not keep pace with the amendments made in the French model, and there was no attempt at any time to bring about any thorough or scientific regulation of the Criminal Law.

The Mandatory Administration in Palestine early recognized that the Ottoman Code was not a suitable instrument of justice, and decided to replace it. But the efforts to that end took over fifteen years to bring to a conclusion, though in this interval a large number of detailed changes were made in the Criminal Law by a series of Criminal Law Amendment Ordinances.

The original project for a new Penal Code for Palestine was based upon a draft that had been prepared for Egypt during the Great War. At that time it was contemplated that the Capitulatory System—which is at last reaching its appointed term—would be abolished, or radically modified, when peace was made, and there were proposals for a unified system of courts in Egypt dealing with natives and foreigners. In preparation for that reform a modernized Criminal Code which, though still mainly derived from the French archetype, should comprise elements from the

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[1] It has, however, been recently held in Palestine that the plaintiff claiming *diyet* is not required to prove negligence. This decision seems to accord with the Moslem law.

English and other systems, was prepared by a body of legal advisers of the Egyptian Government. The Code did not come into force in Egypt, but it was thought that it might have a posthumous child, so to say, in Palestine. It was submitted for the criticism of the advocates and others in Palestine, and there was a little outcry. It would be disturbing the traditional habits of the people—that is, the criminal part of the people; it would be an unwarranted infringement of the *status quo*. At that time the *status quo* was regarded as the holy of holies. More serious, perhaps, was the disfavour of the Colonial Office when the project was submitted for its consideration. They desired a Code based primarily on English and not on French models.

The serious rioting in Palestine of 1929 emphasized the need for some change in the provisions of the Palestine Criminal Law. The Commission of Inquiry into those riots, presided over by the late Sir Walter Shaw, expressly recommended the introduction of a law to take the place of the Ottoman Penal Code, which in their view contained inadequate provisions about the law of homicide. Following the riots a number of persons were brought to trial on charges of premeditated murder, which was a capital offence. But in most cases the charge could only be one of unpremeditated murder, which was not a capital offence. Nearly a score were convicted of the graver crime; but there was great discontent at what was said to be a distortion of the Ottoman Code. An attempt was made to appeal against the convictions to the Privy Council, on the ground that the courts in Palestine had ignored the law which they were purporting to apply. It was urged that this was a denial of natural justice. They had in effect, it was said, applied the law of England relating to murder, while the law of Turkey was fundamentally different. The Privy Council rejected the application for special leave on the ground, so often reiterated, that they were not a Court of Appeal.[1]

The New Criminal Code of 1937.—At last, in 1933, a new Criminal Law was published as a Bill in the *Official Gazette* of the Government. The model chosen was the Code introduced after the War into the East African colonies and protectorates, which was in turn derived from a Criminal Law enacted by the State of Victoria in the latter part of the nineteenth century. The Victorian Crimes Law may be regarded as the first edition. The East African Code was the second edition, and a third edition, issued while the project was being studied in Palestine, was the Cyprus Code. In that island the Ottoman Penal Code had remained in force for fifty years, but in 1928, some time after Cyprus became a Crown Colony, the Ottoman Code was discarded in favour of that of East Africa. The Palestine Code was to be a fourth edition of the text.

Though Palestine has as yet no representative Legislative Council, opportunity is given for public criticism of any legislative project. A Bill must be published in the *Official Gazette*, and so brought to the public notice, and it cannot normally be enacted as law until at least one month has passed from the publication. Important measures are in practice left open for criticism during a much longer period, which sometimes runs into years. Varied criticisms were received upon the draft Criminal Code, some from legal bodies inside and outside Palestine. There was considerable local objection to the wide extension of capital punishment for murder, which marks the English as distinct from the continental system, and also to the introduction of flogging as a penalty for certain offences of violence. The Howard League in England addressed a Memorandum to the Colonial Office on these points. The criticisms were thoroughly examined ; and after a long interval the Bill in a revised form was published again in September 1936. There were many changes but no accompanying note to explain them. At the beginning of 1937 the Bill was enacted without further change, and became part of the law of Palestine as from February in this year.

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[1] *Ahmed Jabir Khatib* v. *Attorney-General*, March 1930, Palestine L.R., p. 452.

The main part of the law follows the English model ; but it has interesting features incorporated from the old French law, and from regard for local traditions and institutions. In form it accords with what has become the accepted arrangement. Part I contains general provisions. Part II specifies the offences and has eight divisions : offences against public order ; against the administration of lawful authority ; offences injurious to the public ; offences against the person ; offences relating to property, etc. The Articles defining the offences are not followed, as in the Indian Penal Code, with examples, but there are a number of explanations with regard to offences, such as a chapter which prescribes the duty of different classes of persons relating to the preservation of life and health.

Attention may be drawn to a few of the provisions in the general part of the Code which differ from the English law. As regards criminal responsibility the minimum age is fixed at nine years, and a person under the age of 12 is only responsible if it is proved that he had capacity at the time to know that he ought not to do the act or make the omission. The court by which any person is convicted of an offence may award a sum not exceeding £100 by way of compensation for any loss caused by the offence to a person injured by it. At the same time, the procedure, which is a part of the French system hitherto in force, of allowing the victim of the offence to constitute himself a civil party and claim damages in the criminal proceedings, is maintained, and the court may award damages not exceeding £100 by way of satisfaction to a person injured by the offence whether he has or has not constituted himself a civil party.

Homicide.—The most striking change between the original Bill and the law as enacted is in regard to murder. It is a paradox that a country in which the people are highly civilized and have a strong sense of law and order can put up with a severe Criminal Law, while a country in which the majority of the people are less civilized, and passions are easily roused, needs a law to be tempered to their weaknesses. The ruthless severity of the English law of homicide is altogether alien to Arab morality. If it had been adopted, it would have led the populace to defeat the law which was contrary to their feelings. I heard lately an expert authority on the life of the Arabs, telling of a murder which took place in Transjordan. Everybody, including the kinsfolk of the murdered man, gave false evidence before the court in order to secure the acquittal of the accused man, who was the murderer, because they objected to the severity of the law.

The first Bill defined murder in accordance with English ideas and punished it capitally. It further prescribed (Art. 237) that any person causing the death of another person is presumed to have murdered him, unless the circumstances are such as to raise contrary presumptions. The burden of proving circumstances of excuse or justification are upon the person who is shown to have caused the death of another. This latter Article stating the English law as it was conceived prior to *Woolmington* v. *Director of Public Prosecutions*[1] is not preserved in the Code; moreover, the application of the capital penalty is much restricted, and it is only where aggravating circumstances are proved by the prosecution that killing is murder. The chapter starts by a provision that any person who, by any act or omission, causes the death of another, is guilty of manslaughter and liable to imprisonment for life. There follows the definition of the graver offence of murder punishable with death, of which there are now only four categories, namely: where a person (*a*) wilfully causes the death of his father or mother, or grandfather or grandmother; (*b*) with premeditation causes the death of any person, or (*c*) wilfully causes the death of any person in preparing for or to facilitate the commission of an offence, or in the commission of an offence, or (*d*) where an offence has been committed, causes the death of a person in order to secure the escape or avoidance of punishment in connexion with such an offence of himself or of a person associated with him.

The draftsman next proceeds to define "premeditation." In order to establish that the accused killed with premeditation it is necessary to prove that three conditions were present together, namely that the accused—

> (*a*) has resolved to kill such person or to kill any member of the family or of the race to which such person belongs, provided that it shall not be necessary to show that he resolved to kill any particular member or such family or race, and
>
> (*b*) he has killed such person in cold blood without immediate provocation, in circumstances in which he was able to think and realize the result of his actions, and
>
> (*c*) he has killed such person after having prepared himself to kill such person or any member of the family or race to which such person belongs, or after having prepared the instrument, if any, with which such person was killed.

The Article continues:

> In order to prove premeditation it shall not be necessary to show that an accused person was in any state of mind for any particular period, or within

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[1] 25 Cr. App. R. 72; 51 T.L.R. 446.

any particular period, before the actual commission of the crime, or that the instrument, if any, with which the crime was committed was prepared at any particular time before the actual commission of the crime.

The purpose of the clause is to get rid of a troublesome provision of the former law in Palestine expounded by the Ottoman Court of Cassation, by which it was necessary to show that the accused had conceived the murder for a full twenty-four hours before the killing in order to establish premeditation. Another striking innovation in the definition is the inclusion within the element of premeditation of the intent to kill a member of the race. The section of the Code is designed to deter racial murder, so far as law can be a deterrent. The adoption, or rather the adaptation of the principles of the Ottoman law to the English conceptions of murder is the more striking because nothing of the kind was attempted when the principles of the English Criminal Law were introduced in Cyprus, where murder is almost equally common. It is an illustration of the value of public criticism in this country, since it is unlikely that, had not there been an expression of the opinion of bodies like the Howard League, the objections raised in Palestine alone would have prevailed. It is almost forgotten now that some six years ago a Parliamentary Committee in England recommended changes in the law of murder with a view to reduce capital punishment, and proposed a suspension of the death penalty for a period of five years. So far their recommendations have had no result. Perhaps the example of the Palestine Code may stimulate action in England.

Flogging.—Another notable change from the original draft is the complete omission of the penalty of flogging. Here again regard was shown for public criticism, and again the contrast is marked with the Cyprus Code where flogging is introduced as a punishment for those offences in respect of which it may be inflicted in England.

Public Offences.—The chapters about public offences contain several interesting provisions which reflect on the peculiarly difficult conditions of government in the country. The law about seditious conspiracy is remarkably severe. It is no defence to a charge that the words alleged to have a seditious intention are true. And a significant change in this part was made between the clause in the Bill published in 1933 and the section in the Ordinance passed in 1937 which may be due to the troubled time through which the Government of Palestine had passed. The Bill made it lawful for a person to attempt to prevent by lawful means the alteration of any matter in Palestine as by law established, and also to point out in good faith with a view to their removal any matters which produce, or have a tendency to produce, a feeling of ill-will and enmity between different classes of the population of Palestine. Those two saving clauses have disappeared. Again, to the Article dealing with the publication of false news with intent to cause alarm to the public, a new clause has been added which makes it no defence to a charge that the person did not have reason to believe that the statement or report was false, unless he proves the accuracy of the statement or report.

Another Article which has been added since 1933 makes it an offence to instigate, expressly or by implication, any person or class of persons not to pay, or defer payment of, what is termed euphemistically "a notified liability." A notified liability, which no doubt includes a tax or rate of the Government, is defined as one notified by the High Commissioner in the *Official Gazette*. The threat of non-co-operation by refusal to pay taxes has been made in Palestine, though not yet carried into effect. Yet another significant innovation from the original Bill is an Article which makes it an offence to do anything that is a public mischief. That omnibus Article adopts the principle which was upheld in England in the case of *Rex* v. *Manley*[1] in 1933, and which has caused great perturbation amongst legal puritans. It will be remembered that a charge in England was brought against a woman who, by a false statement, caused the police to devote time to investigating fictitious allegations of robbery. That was held to be a misdemeanour by Common Law. In Palestine, where persons are ingenious in disturbing the public order, the need for strengthening the hands of the Government by a kind of criminal equity is constant.

Carrying of Knives.—Though the general framework is now a colourless English statement of the law, a little local colour survives in the Criminal Code. Thus there are four Articles dealing with the carrying of knives and daggers. The carrying of these articles of what may be called criminal conditional contraband may be prohibited in any area by the High Commissioner, and thus becomes a misdemeanour, with a reservation for a clasp-knife which has not a blade of more than 10 centimetres in length, and provided it is not so constructed as to be convertible, by means of a spring or otherwise, into a dagger or knife with a fixed blade. The original draft, following the Cyprus Code, had a peculiarly severe provision, making it a criminal offence to carry a knife at any wedding celebration. In Cyprus, apparently, wedding celebrations are an incitement to family violence. But second thoughts have caused its elimination in Palestine, where the use of knives is associated rather with religious celebrations. The Moslem rules relating to blood money, which were included in the Ottoman law, figure no longer in the chapter relating to murder and manslaughter. But, on the other hand, there is a provision in the general part of the Code that the power of the court to award compensation to the victim of an offence shall not affect rights to blood money. And the courts have recently confirmed that the liability to pay compensation for death or injury caused by negligence applies in the case of a non-Moslem equally with a Moslem.

Offences relating to Religion.—The new Code contains a chapter on offences relating to religious and public monuments. In a country where religious and national feelings are so passionate and quickly roused, that aspect of the Criminal Law has a special importance. The old Ottoman law naturally gave a position of privilege to the Moslem religion. It was a specific criminal offence to blaspheme the Prophet ; and it was also an offence to violate publicly the Fast of Ramadân, the month in the year in which, during the hours of daylight, no faithful Moslem may eat or drink. The courts in Palestine, in an interesting series of decisions, upheld during the last years the validity of that Article of the old law which was impugned on the ground that it conflicted with a provision in the Mandate requiring no discrimination between the inhabitants on the ground of race or religion. In future, however, the question will not arise, because that kind of action is covered by new provisions which apply without particularity to offences relating to religion. There are four Articles on the subject. The first deals with destruction or damage to a place of worship or object which is held sacred by any class of persons, the second Article punishes a person who wilfully disturbs any meeting of persons lawfully assembled for religious worship. The third punishes a person who trespasses in any place of worship or burial-place, or causes disturbance to any persons assembled for the purpose of funeral ceremonies. The last Article deals with a person who publishes any print, writing or effigy, etc., calculated or tending to outrage the religious feelings or beliefs of others, or utters in a public place and in the hearing of another person any word or sound calculated or tending to outrage such feelings or beliefs. It is notable that Sir FitzJames Stephen, in his *History of the Criminal Law*, expressed apprehension as to a similar article in the Indian Penal Code which has since become common form in Oriental countries under British rule. With regard to what is commonly known as the Wailing Wall in Jerusalem, a relic of the Western Wall of the ancient Jewish Temple, and the dispute about which was the immediate cause of the disturbances in 1929, special penal provisions concerning trespass and violation of the regulations of worship are laid down in an Order in Council which defines the respective rights of Jews and Moslems at that Holy Place.

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[1] [1933] 1 K.B. 529.

Offences relating to Marriage.—Another chapter of the Code, which has particular interest, because of local circumstances and the impact of Western ideas of Criminal Law on religious conceptions, is that concerning offences relating to marriage. The Ottoman Code naturally contained no Article about bigamy, since the Moslem faith which was paramount allows a man to have four wives. The new Code, on the other hand, introduces the offence, but, as does the Cyprus law, provides an exception where the law governing the personal status of the husband, both at the date of the first and at the date of the subsequent marriage, allowed him to have more than one wife. The evil of child marriage, which is present in the Middle East as well as in India, has attracted the attention of bodies in England, at the League of Nations and elsewhere, concerned with social reform ; the matter had to be handled with great care in the Criminal Law because of a provision in the Moslem Jurisprudence which permits marriage as soon as the female has reached puberty. An Article of the Code makes it an offence to celebrate a marriage with knowledge that no licence has been issued by a competent authority, and also to marry, celebrate, or in any capacity assist at the celebration of the marriage of a female who is under the age of 15 years completed, or to issue the licence for the celebration of such a marriage. An exception, however, is recognized if the defendant can prove three things: that the marriage took place with the consent of any living parents or guardians of the female; that, at the time of the marriage, the female had reached puberty; and that a certificate had been produced from a licensed medical practitioner that no physical ill-effects would be likely to follow the consummation of the marriage by the female. Another chapter of the Code makes it a criminal offence for the husband who, being married to a girl under the age of 15 years, has sexual intercourse with her, unless likewise he can prove that she has reached puberty, and that a medical certificate has been obtained. While the celebration of a marriage is at present entirely controlled for Palestinian subjects by the religious authority, and a licence for marriage must always be obtained from the competent religious authority, it is made a specific offence to issue such a licence for the celebration of the marriage of a female under the age of 17 years completed, unless it has first been ascertained that the parents or guardians of such female have consented thereto. These provisions are original additions to the Cyprus model.

Adultery.—The Ottoman Code has an article dealing with adultery which, in accordance with the Napoleonic model, was an offence differently constituted for a woman and a man. In the case of a woman it was punishable absolutely; in the case of a man only if it was committed in the marital home. FitzJames Stephen commented on the introduction of such a provision into the Indial Penal Code, that it was the greatest concession made to native ideas. The original draft of the Palestine Code maintained the offence. The new Code omits the offence altogether, and thereby would seem to take away from the injured spouse any chance of obtaining compensation for the unfaithfulness of the other spouse, since the religious courts which grant divorce cannot award damages, and the Civil Law knows nothing to correspond with the English action now becoming so popular for enticement of a wife. It is striking, too, that the new Code in the chapter on murder and manslaughter omits any specific provision for the case where a person found in the act of adultery is killed. The Ottoman law expressly reduced the penalty in such cases, since considerable sections of the population regard it as a duty amounting to a moral obligation for the male kinsman of a woman who has been unfaithful to kill her and the man with whom she is unfaithful. Murder "in defence of the family honour" is still common in Palestine, where the murder rate, so to say, is higher than in any country. In future, any such killing will be treated as ordinary murder, or manslaughter, according as premeditation is or is not proved. This is a definite departure from the customary social morality and is likely to multiply the cases in which the High Commissioner will be called upon to consider the execution of a death sentence.

Tribal Courts.—The Government of Palestine has maintained hitherto tribal courts consisting of Arab sheikhs in certain areas which are inhabited by Bedouin tribes. These courts apply tribal custom and practice ; and presumably they will still deal with charges of killing " in defence of the family honour " in accordance with the practice, and will not be bound by the severer prescriptions of the new Code, which for the Bedou would be a Draconian law. The judgments of the tribal courts are subject to review by the British President of a district court ; and an Article of the Code provides that if the court is satisfied that the accused person is a member of a tribe which has been accustomed to settle its disputes in accordance with tribal custom, and it is in the interest of public order that the case should be so settled, the court, after sentencing the accused to the penalty prescribed by the Code, may substitute such penalty, not being repugnant to natural justice or morality, as is customary under the tribal rule. That provision mitigates in some degree the procrustean severity of the law. It would be hard to lay down any code which would be equally appropriate to the very progressive and completely Westernized Jewish population of Palestine, the Arab fellahin and the tribal Arabs who are still in the conditions of our Middle Ages.

Multiplication of Legal Systems in the Middle East.—The Ottoman Penal Code remains in force in Transjordan, because the legislation of Palestine does not extend across the Jordan. It remains in force also, with such changes as the French Administration has introduced by decree, in Syria and the Lebanon. It has been swept away with the rest of the legislation of the Sultans in the Turkish Republic. There is a striking and somewhat disquieting multiplication of legal systems, as well as of political units, in the Middle East. In 'Iraq the new Criminal Law introduced by the British Administration follows the Indian, modified by additions from the Egyptian Draft Code ; in Syria the antiquated Ottoman Code still holds ; in Palestine we have a modified version of a consolidated statement of the English Common Law and Statute Law ; in Cyprus we have another less modified statement of that law. In Egypt it is likely that the new Code which will be required for the Mixed Courts in their enlarged criminal jurisdiction will follow the lines of the present Native Criminal Code and have a French archetype. It cannot be altogether a good thing that peoples whose social and ethnic circumstances are similar should develop with such varying legal institutions. But perhaps the Middle Eastern nationalities must go through a period of legal experiment before they can unify their legal systems.

AMERICAN NEUTRALITY AND THE BILL OF APRIL 29, 1937.

[*Contributed by* H. W. SPIEGEL, DR. JUR.[1]]

ON April 29 Congress gave its assent to the new Neutrality Bill. The old Bill being due to expire on May 1, an extraordinary effort was needed in order to fill a gap which might have caused a serious danger to American neutrality. Eighteen Bills in all had been introduced in the two Houses in the past three months, but the number had finally been reduced to two, the McReynolds Bill in the House of Representatives and the Pittman Bill in the Senate. These two were consolidated in a draft Bill which received the unanimous support of the House and a majority vote of 41 to 15 in the Senate.

History of American Neutrality Legislation.—In order to be able to appreciate the full import of the new Bill it may be helpful to glance shortly at the history of American neutrality legislation, the origin of which may be traced back to the beginning of the American Republic. But whereas the statutes of 1794, 1817 and 1818 stressed the importance of those rights which international law accords to neutrals and thereby refrains from prohibiting legitimate assistance to belligerents, modern legislation aims at complete prohibition of what would otherwise be legitimate commercial intercourse between the United States and the belligerent parties. After the statute of 1898, which empowered the President during the Spanish-American War to prohibit the export of arms where such export seemed undesirable, a general statute was passed in 1912 empowering the President to put, at his discretion, an embargo on certain implements of war in the case of internal upheavals in the South American States. In 1922 these measures were extended to countries where the United States exercised a special power of jurisdiction. President Hoover's attempt, however, to extend his discretionary powers during the armed conflict in Manchuria in the years 1932 and 1933 was not favourably received by the Senate. It was not until the Chaco conflict in 1934 that a new Bill was passed, giving discretionary power to the President to prohibit the " sale " of arms to Bolivia and Paraguay, after consultation with the other American Republics. It is to be noted that, upon the strength of early treaties concluded with these two countries, the " export " of arms remained unrestricted. The peculiar differentiation between " sale " and " export " resulted in rendering the new Bill practically useless.

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[1] The author wishes to express his gratitude to Mr. F. Honig, of the Middle Temple, London, for kindly reading the manuscript and making several valuable suggestions.

Neutrality Bill of 1935.—The first Neutrality Bill of a comprehensive character was passed as late as August 31, 1935, when the Italo-Abyssinian conflict threatened to result in armed conflagration. Public opinion in the United States was then in favour of what was called " neutrality at all costs," and even at the cost of sacrificing the traditional rights accorded to all neutral countries by international law for the preservation of which the United States had fought two of their three wars with foreign Powers. Following upon the lines of older statutes, but extending their scope considerably, this Bill empowered the President to prohibit the export of arms to foreign Powers engaged in armed conflict. At that time Congress was still reluctant to extend the presidential mandate to raw materials, such as steel, oil, copper, scrap iron, etc. But when the President shortly afterwards exercised his power by imposing an embargo on the export of arms to Italy and Abyssinia, he strongly emphasized his wish that American exporters should refrain from exporting raw materials which might be used for military purposes. He added that if, contrary to his wishes, anybody entered into commercial relations with the belligerents, he did so at his own risk.

Extension of Scope of Bill.—As early as February 29, 1936, the scope of the Bill was extended in three ways. Hitherto it had been a matter for the President's discretion whether or not he wished to impose the embargo on arms. He now becomes bound by law to do so. Furthermore, the Bill imposes a duty not to assist the belligerents by granting them credits or loans or by purchasing, selling or otherwise handling their securities or other obligations. Finally, the Latin-American countries are exempted from the embargo in the case of their being involved in an armed conflict with a non-American Power. The President was, however, not given power to impose an embargo on the export of raw materials.

During the whole of the years 1935 and 1936 opinions were voiced advocating an extension of the presidential powers so as to further a sanctionist policy for the prevention of war in accordance with the policy pursued by the League of Nations. That these opinions are to-day not more than a dead letter follows from the fact alone that they remained unmentioned in the eighteen draft proposals which preceded the present Bill. From time to time it was suggested that the binding mandate given to the President with regard to the embargo on arms should be transformed into a discretionary power. The legislature, however, refused to sanction such a proposal, and now, as then, the President is bound by law to proclaim an existing state of war, which proclamation automatically brings into play the absolute prohibition of any export of arms to and financial intercourse with the belligerents. The power given to the President when he wishes to revoke the proclamation is somewhat wider in that the Bill provides that he may do so whenever " in his judgment " the conditions underlying the first proclamation have ceased to exist. The Bill of 1935 did not mention civil war, and it fell upon the Government of the United States to apologize to the other Powers for the grant of export licences to American citizens concerning the export of aeroplanes and gas masks to Bilbao and Valencia. The reason given in the apology was the inadequacy of American neutrality legislation, which made no provision for the case of civil strife. The new Bill therefore provides that the President is, in the case of civil war in a foreign country, bound to impose an embargo provided that such civil war is of a magnitude or is being conducted under such conditions that the export of arms would threaten or endanger the peace of the United States. This embargo can, according to the wording of the Bill, be imposed at the discretion of the President. The critics of the draft proposals contended that the Bill would empower the President to influence the outcome of internal upheavals in foreign countries. It was also said that the traditional practice of previous governments had never sanctioned the imposition of embargoes except as against insurgents.

Embargo on Export of Raw Materials.—The most significant new feature of the Neutrality Bill is undoubtedly the extension of the President's discretionary power to impose an embargo on the export of raw materials. While the new Bill is in general not limited to a certain time, this power of the President expires after two years. It was with comparative ease that the President was given this great power, which for years past had been denied to him and which one day may be of enormous importance.

Three proposals were considered in connexion with the question of raw materials. According to one of these, the President was to be given power to add to the list of arms an additional list of raw materials. Another suggested that the President should be authorized to restrict the export of raw materials in certain quotas, and according to the third proposal, which was finally accepted and ratified, the export of raw materials should only be sanctioned on a cash-and-carry basis, *i.e.* upon payment in cash by the foreign exporter and upon the understanding that the materials should not be transported in ships sailing under the American flag. Once the President has proclaimed the existence of a state of war abroad, the embargo on arms and financial transactions follows automatically. Not so the embargo on raw materials. As regards these, the President shall impose an embargo provided that such action "is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States."

The extraordinary power which has been given to the Head of the State in connexion with the embargo on raw materials has been viewed with dismay by many American lawyers and politicians. Even some of those who advocated measures of the kind mentioned voted against the Bill in the Senate. John Basset Moore, late judge of the Permanent Court at The Hague and Nestor of America's international lawyers, described this part of the Bill as the most pernicious form of dictatorship, and Professor Edwin Borchard, another well-known international lawyer, used the words "unneutral neutrality."

Other Features of New Bill.—The other measures contained in the new Bill are less outstanding than the problem of raw materials. In future, the embargo on arms automatically brings in its train the prohibition to travel in vessels belonging to either belligerent. Whereas hitherto American citizens were allowed to travel in such vessels at their own risk, they will now be severely punished if they do so. In the case of humanitarian organizations carrying on work in the interests of war victims the embargo on financial transactions may be waived. Collections by these organizations are, however, subject to the supervision of the authorities.

The power of the President to prohibit the sailing of submarines in American waters has been extended to armed merchant vessels. Unlike the old law, the present Bill expressly mentions among the modes of transport not only watercraft, but also aircraft.

In order not to endanger commercial relations with Canada in the case of a future war involving Great Britain, the Bill provides for certain exceptions to the embargo on raw materials in intercontinental American commerce. The American republics are expressly exempted from the application of the Bill in the case of their being involved in a war with a non-American State, unless they are co-operating with such a State in a war in which the latter is engaged. It must be noted that the Bill contains no provision for the restriction or stoppage of exports in order to prevent the outbreak of armed conflicts. Likewise, there is no provision to the effect that the *de facto* waiver of traditional neutral rights as contained in the Bill does not prejudice the exercise of those legal rights to which every neutral is by international law entitled. Some doubt may be expressed as to whether the United States will, in years to come, be able to claim those rights, since the virtual waiver at the present time may seriously prejudice such a claim in the future.

Criticism of New Bill.—The critics of the new Bill view its tendencies with suspicion, reminding the public of the disastrous consequences of the embargo imposed by President Jefferson in the years 1807–9, which brought the United States to the verge of civil war and caused the President to be looked upon not only as a tyrant but also as an ally of Napoleon. It is also contended that a purely national measure such as the new Neutrality Bill is futile, having regard to the chaotic state in which the law of neutrality emerged from the World War. Some people say that the power to impose an embargo involves necessarily a political decision in that it invariably favours the belligerent who is strongest in naval power. This is undoubtedly true, inasmuch as a strong naval Power will always be able to transport raw materials in her own vessels once payment has been effected in cash. Finally, the so-called "boomerang-neutrality" has been mentioned by some original who visualizes dangers threatening from those Powers who have been adversely affected by an

American embargo and who may one day take revenge by prohibiting exports of war materials to the United States.

Taken as a whole, the new Bill may be regarded as a compromise between a complete isolationist policy and the desire for freedom of commerce. It will, if strictly applied, prevent incidents such as the tragic fate suffered by the *Lusitania* in that American citizens will not be allowed to travel in vessels belonging to the belligerents. The equipment of merchant vessels for military purposes being prohibited, it will no longer be possible for foreign submarines to sink American vessels as a " measure of precaution," and in view of the fact that the Government guarantees the absence of contraband of war in American merchant vessels, these will in future not be liable to search by belligerent men-of-war. Finally, the Bill will dispose of those rumours which have in the past accused American bankers of precipitating armed conflicts involving the United States.

Thus the American neutrality law marks the culmination of a gradual development which, step by step, gives up the supposedly eternal principle of the " freedom of the seas " and the freedom of neutral commerce cherished, above all, by the Anglo-Saxon peoples for centuries past. There are already tendencies to amend the new Bill. It is proposed to authorize the President to declare a blockade of the coasts of a Central or South American Republic if it becomes involved in a civil war. By such means an intervention of a foreign Power is sought to be prevented. This idea, which has been raised by the events in Spain, could not be carried out before Congress assembles again.

THE SWISS COMPANY LIMITED BY SHARES.

[*Contributed by* Dr. Marcus Wyler, *Advocate, Zurich.*]

The Swiss Code of Obligations (*Obligationenrecht, Code des Obligations*) of 1881 was revised in 1911 and brought into line with the Civil Code of 1907. Since that time, and notably since 1918, it has been frequently amended, more particularly as regards the provisions dealing with commerce. A general revision was undertaken in 1923 and has been successfully terminated by the final adoption of the revised Code on December 18, 1936.[1] The revised text became law on July 1, 1937, and some of its results are already in evidence, so far as commercial corporations are concerned. Thus, accountancy rules have been altered and the auditing companies and certified accountants are busy co-ordinating facts and figures to accord with the new rules. The introduction of the hitherto unknown Partnership with limited liability has proved in some degree a successful innovation ; a number of small limited companies have already been transformed into partnerships of this description, and some such partnerships have been newly established. Space is unfortunately insufficient to deal with another important innovation, namely, the transformation of the Mutual Association (*Société co-opérative*) from a nondescript company form into an organization definitely created for the mutual assistance of the members.

The Company Limited by Shares.—In dealing with this form of corporation we shall follow as far as possible the arrangement of the English Companies Act, 1929.[2]

Incorporation of Companies.—Any two or more persons may form an incorporated company with limited liability. Save as mutual associations, companies cannot be formed without a capital or with unlimited liability. There is, on the other hand, no provision in the C.O. prohibiting partnerships for gain with more than twenty members. C.O. 633 provides that at the date of the incorporators' meeting at least 20 per cent. of the initial capital must be either paid up, or otherwise covered in kind according to law. As to the balance, the company will be " limited by guarantee " until the board of directors calls up the balance wholly or partly (680, 682). Every company must, therefore, have a share capital. One of the new features is, that this capital may not be less than 50,000 francs, of which at least 20,000 must be paid up, in cash

[1] Referred to hereafter as " C.O."

[2] Referred to hereafter as " C.A."

or in kind (633 (2)), so that the initial payment into companies of a capital below frs. 100,000 will be above 20 per cent.

Memorandum and Articles of Association.—In Swiss law the " memorandum " of s. 1, C.A. is always coupled with the articles of association. The minimum number of members or shareholders is three in all cases. The provision by C.O. 625 (2), that if the number of members falls below three, any shareholder or creditor may apply for a winding-up decree, does not involve the consequence provided by C.A. 28, namely, that the remaining shareholders are liable for the whole of the debts incurred until the authorized number is again reached. The view taken by the most authoritative writers (*e.g.* Egger, Thalmann, Schneider) is that the text should be interpreted as tacitly admitting the One Man Company.

Where there is no public underwriting of shares, there is no need of a prospectus ; all that is then requisite is a statement in lieu of prospectus (*un rapport détaillé*, C.O. 630, 637) as to any property to be acquired by the company to be paid for by allotment of shares to a member or members. But even when there is no public underwriting of shares, there are still two ways of forming a company. Under the more complicated procedure the prospective shareholder subscribes the draft of the articles, or an underwriting slip (*Zeichnungschein*, *déclaration*) referring to the articles and/or the prospectus (C.O. 629, 632). Thereafter, when the whole of the share capital has been covered by underwriting, a statutory meeting must be called by the promoters. The presence of a notary is required, and both to him and to the meeting the chairman must submit the underwriting slips, or applications, a voucher from the cantonal office as to the receipt of at least 20 per cent. or more of the capital for transfer to the board of the company (633 (3)), and the agreement, if any, as to the acceptance of property by the company in exchange for shares. The meeting may discuss and if desired amend the draft articles. Important alterations require the consent of all the underwriters (C.O. 635). This form of procedure is termed *Sukzessivgründung.*

In addition to this complicated form, which is chiefly designed for companies which apply to the public, the revised Code provides for a simplified form, which in effect merely recognizes an existing practice made possible by the unrevised Code. This is the so-called " simultaneous formation " (*Simultangründung*). The promoters hold a statutory meeting, and sign a deed before the notary setting forth all the facts relating to the formation, and exhibit the vouchers thereto. Either the articles are contained in the deed, or they are signed separately at the meeting. The probability is that with the exception of large companies intending to issue debentures, most companies will in the future be formed " simultaneously." [1]

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[1] It is interesting to note that in nearly all states in which there is a choice of two forms, the private form is preferred. Thus Dr. Trajano Miranda de Valverde, in his masterly treatise, *Sociedades Anonimas*, recently (1937) published in Rio de

The company will not be a "juristic person" until it is registered in the Trade Register of its seat canton (643(1), cf. C.A. 13, 14). The Common Seal plays no rôle, as there are no sealed contracts in Swiss law. By being registered the company obtains the "right of personality," even if minor mistakes have been made in its constitution. If by major mistakes the interests of members or creditors have been seriously impaired, the interested party has a period of three months, as from the publication of the entry, during which to petition for a winding-up decree. This is a new right (643 (2) (3)).

Limited Companies may choose descriptive or fancy names, or adopt the family name of a promoter, in which case, however, if the designation Limited Company precedes the name it must be fully written out, while, if it follows the name, it may be indicated by the initial letters (A.G., S.A.). There are further provisions prohibiting the use of terms like Swiss, Federal, etc. See Art. 944 ff., 950, and Ordinance on the Trade Register of June 7, 1937, and compare C.A. 17, 18.

Share Capital and Debentures.—The elaborate provisions of C.A. 36–38 as to liability to third parties injured by untrue statements in prospectuses, etc., are represented in a very simplified form by C.O. 752–3.

The special provisions as to Debentures (C.A. 73–8) do not exist in the company law of the C.O., although it mentions Bonds or Debentures (*Obligationen*) in several of its articles. (C.O. 651 (8), 669, 704, generally with respect to creditors, and 723 as to special auditors for companies having issued debentures.)

The floating charge is foreign to the C.O. on account of the Swiss theory of the *numerus Clausus* of real rights, the non-existence of mortgages on personalty and the specialization of charges.[1] There is, however, some legislation for the protection of bond-holders, which to a certain extent represents C.A., Part III.[2]

Issue of Preference Shares.—Preference shares of "priorities" (*Prioritäts = Vorzugsaktien*) could be issued under the old Code. They are now provided for by C.O. 654. Preferences may be given under the articles, or by altering the articles, and in case there are to be second or third preferences, by a procedure which is designed to protect the interests of the holders of first preferences (655, see 649). There is no provision for the redemption of preferences, but the articles may contain one ; still, it is doubtful whether they may provide for a redemption in the sense of C.A. 46 (1) a–d, as the C.O. knows of no authorized as against issued capital, and a company must always retain the capital which has been registered. Redemption, therefore, requires an alteration of the articles.

Janeiro (Borsoi & C.) states (p. 116, Nr. 110) that public underwriting has quite disappeared. Even big Brazilian companies present themselves to the public fully constituted.

[1] See F. Weiser, *Trusts on the Continent of Europe* (Sweet & Maxwell, 1936, pp. 45–9, etc.).

[2] See the writer's *Sanierungen und Obligationäre*, Schulthess, 1936.

The issue of shares at a discount is absolutely barred by C.O. 624. "Shares may only be issued at face value or at a rate above it." On the other hand, it has always been held lawful to issue debentures or a series of bonds at a discount, but not to issue single bonds below par.

Plural Voting.—The old Code contained an article (640) under which no shareholder might vote for himself or as proxy for over one-fifth of the shares represented in a meeting. The revised Code provides that the articles may restrict the voting right, but that each shareholder must have a vote, and that, as a rule, the holdings determine the number of votes (692). It admits shares with a plural vote, either if provided for by the original articles, or by special resolution, for which votes representing two-thirds of the issued capital must have been given (627 (10), 648, and see 693).

The idea of converting shares into stock and *vice versa* is foreign to the C.O. Where there are shares with plural voting, they must be nominative and fully paid. Partly paid up to bearer shares (*actions au porteur*) may not be issued (C.O. 683). Where partly paid up nominative shares are issued, the board of directors may refuse to enter them in the share register unless either seller or buyer give security for the unpaid amount (686). Consolidation and subdivision of shares as in C.A. 50 (b) and (d) are possible under C.O. 623. Consolidation is not possible without the consent of the shareholder (623 (2)), and the transactions must be registered, as under C.A. 51.

Increase of Share Capital.—The increase of the original capital requires the same proceedings as the formation of the company (C.O. 650), and publication not only in the Trade Register, but also in the Trade Gazette. As there is no authorized as against issued capital, there can be no selling from the "*souche.*" Newly issued capital must be offered in the first place to the existing holders, unless the articles or a special resolution provide otherwise (652; cf. C.A. (1st Sched.), Table A, s. 35). Dr. Thalmann calls this a rather weak form of a right.

Interest out of Capital.—So-called construction interests (*Bauzinsen*) for a certain duration may be provided for by the articles (676), except that there is no official control as provided by C.A. 54.

Reduction of Share Capital.—A resolution for the reduction of the share capital requires a previous report by a recognized auditing body, stating that even after the reduction the creditors will be fully covered by assets (732, cf. C.A. 57). In no case may the capital be reduced below frs. 50,000. When publishing the resolution, the Board must inform creditors that they may claim payment or ask for security within two months (733). Where a reduction in the share capital does not exceed a deficiency in the same, the notice to creditors may be dispensed with (735). Purchase by a company of its own shares is only lawful in special cases.

Meetings and Proceedings.—There are annual meetings and special meetings; the latter may be called by the auditors, or, upon request of holders of one-tenth of the share capital, by the court, if the Board fails to act upon the request (699). When all shareholders are present they may constitute a " universal meeting " and may then take decisions on all questions interesting the company (701).

Appeal to Court against Resolutions at the Meeting.—Within two months after a meeting any shareholder may appeal against resolutions which are in contradiction to the articles or the law (706).

The Board of Directors (*Verwaltung, Administration*).—Non-members elected to the Board must forthwith qualify by becoming shareholders (709). The Board may consist of one member only (707). If so, he or she must be Swiss and resident in Switzerland. If there are several members, the majority must have these qualifications. In the case of holding companies with a majority of interests outside Switzerland, the Federal Council may dispense with these qualifications wholly or partly. If these qualifications cease to be possessed and dispensation has not been granted, the Trade Registrar may fix a term for compliance, failing which he may declare the company dissolved (711).

There are no inspections in the sense of C.A. 135–8, but there are special auditings by qualified auditors in the case of companies with a share capital of frs. 5,000,000 or more, and other companies which, though not under the special regulations provided in the case of banks, hold themselves out as receiving money from the public for business purposes.

Board of Auditors (Comptrollers).—This may, too, consist of a sole auditor, who need not be a professional expert, but the practice of employing an auditing company is spreading (727). The duties of auditors have been increased. They are required to say whether the balance-sheet and profit and loss accounts represent the real situation of the company and are in accordance with the provisions of the law. If the auditors observe that something is amiss, they must inform the Board and, if it takes no action, the Meeting. The latter may appoint special commissioners or experts (728–31). The Meeting must not pass the accounts before having heard the Board of Auditors, who must be invited to attend (729 i.f.).

Dividends and Reserve Funds.—While in C.A. the question of dividends is decently hidden in subsection (2) of s. 122, it plays a conspicuous rôle in the C.O. The question of reserves has been the subject of political debate in the Swiss Parliament. At least 5 per cent. of the profits must be set apart for a reserve fund until it amounts to 20 per cent. of the share capital. Further reserves are required in certain cases. Directors' profits (*tantièmes*) may only be voted after deduction of the legal reserve and of at least 4 per cent. for an ordinary dividend. Directors may be obliged to repay bonuses exceeding an appropriate amount for their services if the company becomes bankrupt within three years after receipt (660, 661–79).

Winding-up.—Voluntary winding-up is entirely out of court. A winding-up under court supervision takes place in certain instances when there is a deficiency, of which the court must be informed. Instead of making a bankruptcy decree, a receiver may be appointed. This, as a rule, will lead to an arrangement with creditors. Otherwise, companies are subject to ordinary bankruptcy (725).

Liability of Directors (and Auditors).—The rules as to liability are much simpler than those of the C.A. The C.O. does not contain any criminal law. This is left to the Cantons. The liability of directors (and incidentally of auditors) has been made more severe. While under the old Code the directors were only liable for " wilful neglect " of their duties (*Absichtliche Verletzung*), under the revised law there is a general clause covering all those concerned with the management (C.O. 654). Directors and others are now liable for wilful or simple neglect of their duties (*absichtliche oder fahrlässige Verletzung*). They are liable for "immediate" damage to shareholders. For damage which the shareholders suffer only indirectly, the direct loss falling upon the company (mediate damage), the company, or, in case of its insolvency, the trustee in bankruptcy, is the proper claimant.

INDIAN STATES IN THE FEDERATION.

[*Contributed by* SIR BENJAMIN LINDSAY.]

THE enactment of the Government of India Act, 1935, brought to a close a prolonged period of discussion and negotiation the object of which was the discovery of a scheme which might serve to achieve a measure of political unity between two distinct parts of India which, while geographically united, were politically divided though under the bond of a common allegiance to the British Crown.

On the one side was British India, a territory divided up into provinces which had no autonomous existence : such powers of government as they enjoyed were derived from a central government, itself responsible to the British Parliament. On the other was the territory of the Native States—Indian India—covering about two-fifths of the total extent of the sub-continent and containing, roughly, one-fourth of India's population. Over this territory Parliament has no authority ; it is governed by its own rulers whose powers know no limits except those which the British Crown as the Paramount Power chooses to impose.

These Native States are for the most part survivals of former dynasties and powers which, in one way or another, contrived to prolong their existence after the collapse of the Mogul Empire and the ensuing struggle for supremacy which ended in favour of the British. Some of them, while the Mogul Empire still stood, had been able to establish themselves in a position of practical independence, yielding only a nominal allegiance to the Emperors of Delhi, and were able later to secure recognition from the British power. Others of them, such as the Rajput States of Central India, had been engaged for centuries in conflict first with the Moguls, later with the Mahrattas, and were only rescued from extinction by British intervention which secured them in possession of such territories as they had been able to retain. Still others were principalities carved out during the short-lived period of Mahratta domination in Western India by soldiers of fortune who came to terms with the British forces which broke up the Mahratta Confederation.

By the beginning of the nineteenth century British supremacy had been consolidated over the major portion of India, and by the year 1818 there was no power in India, except the Sikh State of Ranjit Singh, in a position to claim independence. With the extinction of the Sikh kingdom after the second Sikh War (1848–9) all State territory in India was under British suzerainty.

After the suppression of the Mutiny (1857–8), which was effected with the timely and substantial aid of many of the States Rulers, the British Crown assumed the direct government of India as being, in the words of Lord Canning, the first Viceroy, "the unquestioned ruler and Paramount Power in all India." In one of his dispatches as Viceroy, Lord Canning declared the policy which was thenceforward to govern the relations between the Crown and the Native States. The two main pillars of that policy, which has ever since been pursued, were (1) that the integrity of the States as they then existed was to be preserved by perpetuating the rule of the Princes, and (2) that the Crown, as Paramount Power, reserved the right to intervene in the internal administration of the States in the event of flagrant abuse of power on the part of any of the States Rulers.

In this brief statement is to be found the key to the nature of the connexion between the Indian States and the British Crown. It is a relation generally described as Paramountcy—an expression which eludes definition; all attempts to bring this relation within the limits of a precise legal formula have failed. A few years since, *i.e.* in 1928–9, the demand of the Rulers for a legal delimitation of the authority of the Crown was referred to a special Committee (The Indian States Committee) and was rejected as impossible. The Committee in its Report adopted the description of the position set out in a letter from Lord Reading to the Nizam of Hyderabad in 1926, in which he declared that British supremacy over the Indian States was not based, as had been contended, upon treaties and engagements but existed independently of them, and that, in consequence, it was both the right and the duty of the British Government, while scrupulously respecting all treaties and engagements with the Indian States, to preserve peace and good order throughout India.

Subject, then, to this vague but real power of control the Crown has allowed the States to develop on their own lines under their own rulers, who have been left free to follow such methods of government as they choose. Some of them, with large territories and abundant revenues, have introduced into their States institutions modelled upon those of British India and have attained conspicuous success in the way of efficient administration. Others less amply endowed and more remote from contacts with the outside world still stand upon the ancient ways, while the minor States, with scanty resources, are subject, in varying degrees, to the control and advice of British agents in matters concerning internal administration. But in all of them, large or small, the system of government is still, in essence, autocratic. The Rulers follow the Oriental tradition and have shown, hitherto, no disposition to copy the democratic institutions favoured in some of the countries of the West.

In British India, on the contrary, the professed policy has been to educate the people into admiration of democracy with a view to fitting them ultimately for the responsibility of governing themselves, and British

India has in recent years been insistent in its demand for the introduction of the popular government which finds no favour in the eyes of the States Rulers ; there is no unity of political ideals between British and Indian India.

But if the States and British India have thus been living politically apart, they have, none the less, under the Pax Britannica, been inevitably drawn into closer intimacy with each other, especially in the economic sphere. The result is that there has gradually come into existence a field of common interests. Both parties, for example, are vitally concerned with defence against external invasion and have been under the necessity of co-operating in the provision of the means required for that end. Lines of communication which pass continuously through the territories of British India and the States have been constructed at the expense of both sides. And these lines serve also to provide security against internal enemies in the shape of those seasonal calamities, such as famine, to which all parts of India are periodically exposed. Increased facilities for intercourse have led in their turn to important economic and social developments. The States, which in earlier times lived in comparative isolation, have been brought into closer contact with the British Provinces and with each other, and have been drawn into a stream of world-wide influences which operate equally upon British India and themselves. The removal of ancient trade barriers between these different parts of India has been a powerful stimulus to economic progress in which both parties participate. The efforts of both sides have contributed to the establishment of an economic unity which is highly advantageous to both. And yet, by reason of the political division of the parties, the situation has become anomalous, for the States have no representation in the legislative body entitled to deal with these matters of common concern and can therefore exert no influence on policy in this field. They have been led to complain, and not without reason, that in existing conditions their interests are apt to be postponed to those of British India, and it is sufficient in this connexion to recall the full-blooded measures of protection taken in recent years by the Government of British India for the purpose of raising revenue. High tariffs upon imports into British India have hit the States hard ; they have to share the burden of enhanced prices, but take no benefit from the increased revenue.

It is easy, then, to understand the feeling of the States in this matter. However irksome they may have found the control of the Crown as the Paramount Power, they had much more reason to apprehend injury from the transfer of further powers of self-government to the Provinces which was being demanded so insistently by the politicians of British India. For the States, too, could rely upon and demand the fulfilment of the pledge given by Lord Canning in 1860 that their integrity was to be preserved. And the obvious justice of this claim was recognized when it was decided that the States could not be driven into federation against their will. And so it was essential to provide, as has been provided by the Act, that the States can, if they so desire, be included in the federal scheme and given a share of control within the sphere of federal subjects.

From what has been said it is apparent that any plan designed to embrace the States in an All-India federation was bound to differ materially, both in form and in the mode of its creation, from any other federal plan known to history. For other federations have come into existence through agreement entered into by constituent units, homogeneous in structure and of equal, or at least comparable, independent political status. These units have agreed to surrender to a new central body an identical range of powers and jurisdiction to be exercised thenceforward over them all. By their agreement they create a new organism to which, within the range of the powers surrendered, all will be equally subordinate. Outside that range of powers each unit remains autonomous. But these conditions are not to be found in India. The units vary in area, population and wealth. There is no identity of political ideals, much less of political status. The States are, speaking generally, autonomous ; the British Provinces, before the Act came into force, were not, but were under the control of a central government responsible to the British Parliament which has no authority to legislate for the States. In these conditions the formation of a federation by general agreement was out of the question. In the case of the British Indian Provinces federation has been imposed from above and has been accomplished by the breaking up into units of a central government which has retained certain powers and has relinquished the rest to the different Provinces. For the States the process of federation must be the reverse ; their entry must be by agreement involving surrender to the Crown of a portion of their autonomous powers for transfer to a central government of which they will then become an integral part. Outside the range of powers so surrendered they will continue to retain the autonomy they possess. In their case the agreement to federate must be with the Crown, which can refuse an offer of entry which does not propose a surrender of powers extensive enough to make federation a reality. For them union in the federation will be qualified and restricted ; nor need they all become subordinate in equal degree to the central government. In these respects the All-India Federal Scheme contained in the Act differs, and must necessarily differ, from the models adopted elsewhere. The disparity between the units and the inequalities arising therefrom are facts which could neither be got rid of nor ignored by the framers of the constitution, and while the history of previous federal experiments might furnish them with useful guidance, it was clearly expedient for them to avoid any slavish imitation of precedent. Their duty was to produce a scheme which would represent and be suited to the phenomena with which they had to deal.

Needless to say, the scheme of federation provided in the Act fails to satisfy either party and has been subjected to destructive criticism by partisans both of the States and of British India. The book[1] now under review gives expression to the opinions held by the politicians of British India ; and the author is concerned to show that no success can be anticipated for a constitutional plan which does not correspond with any known federal model. The tone of his arguments lends point to the remark of Professor Berriedale Keith, at page 294 of his *Constitutional History of India*, that the fact that the federal scheme embodied in the Act is not a rigid imitation of any existing model is sufficient to render it suspect in the eyes of Indian politicians.

The author has a good deal to say about the doctrine of Sovereignty and ridicules the insistence of the Princes upon their sovereign rights, and it need not be doubted that all along they have been pitching their claims too high. It cannot be seriously disputed now that the States are not sovereign in any of the senses of that ambiguous expression. It would, however, have been more helpful to discussion if the doctrine of Sovereignty had not been appealed to in this connexion, for, as observed by Professor Brierly,[2] sovereignty is merely an abstract idea invented by philosophers and lawyers to explain the political facts of their time. The fact remains that the Rulers of the States do, in one degree or another, exercise autonomous powers which the Act is bound to respect. The States can claim no more than this, nor does the Act concede them more. Then, again, it is a complaint of the writer that the scheme embodied in the Act is not a federal scheme at all because it does not conform to what is styled the " true juristic concept " of the federal relation. And here the author takes the opportunity of castigating Lord Sankey, who, he says, gave a misleading definition of Federalism to the Indian representatives attending the preliminary conferences. As to this, it is sufficient to say that if Lord Sankey was wrong, he was erring in good company, for his description of the federal relation agrees with that given by Lord Bryce, whose authority in such matters is in no way inferior to that of the American jurist to whose opinion the author appeals. It is true that in speaking of the transfer of powers by the units to the proposed central organism it would have made for greater precision if it had been said that the powers were "surrendered" rather than "delegated." But, this apart, there is no fault to be found with Lord Sankey's definition of Federalism, and we venture to think that the author is wrong in declaring that the proposed federation is not a federation at all. The essential characteristic of a Federal State is the distribution of powers between the central organism and the constituent units. As against the author's judgment in this matter may be set the opinion of Professor Berriedale Keith, who has written a sympathetic foreword to this book ; according to him the federation proposed exhibits all the normal characteristics of a federal government. The author again scouts the notion of a " double allegiance " under a truly federal scheme to which Lord Sankey referred. Here again he has against him the authority not only of Lord Bryce but also that of Professor Dicey, who characterizes this double allegiance as being the most conspicuous of the weaknesses attaching to a federal form of government. Even in the United States of America the idea of a dual citizenship was developed under the Constitution according to the opinion of the learned American jurist, Mr. James M. Beck, in his book on the Constitution of the United States.

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[1] *Indian States in the Federation.* By N. D. Varadachariar, B.A., B.L., Advocate, Madras High Court. Foreword by A. Berriedale Keith, D.C.L., D.Litt. (London : Humphrey Milford, Oxford University Press, 1936.) Pp. ix + 156. 5*s*.

[2] *The Law of Nations*, Second Edition, p. 38.

The author then proceeds to enumerate particular defects in the structure of the proposed federation which, in his opinion, render it disadvantageous in many respects to British India. He complains of the inequality between the units arising from the concession to the States of privileges in the shape of " quasi-contractual " rights, a concession which, he fears, will leave the development of the proposed Constitution too much in the hands of the States. He points out that in progressive modern federations equality among the constituent units is the rule, and here he instances the federations of the United States, Canada and Australia. The answer to this objection is that there is no analogy between the cases. No doubt the success of any federal scheme is facilitated where there exists at the moment of federal union an approximate equality in wealth, population and political status between the elements which are seeking to combine. This was the case in the United States, in Canada and in Australia. But from what has already been said, there is no such equality among the units proposed for federation in India—and there are no means of producing such equality. The inequality between the units is an obstinate fact which must necessarily be reflected in the Act which embodies the federal scheme ; the Act has not created the inequality, it has only recognized it, and it could not do otherwise. Nor can it be argued successfully that equality between the constituent elements is an essential condition of their federation.

As for the " privileges " in the shape of " quasi-contractual " rights secured to the States and not conceded to the Provinces, these, it appears, have their origin in the Instruments of Accession which the Rulers must execute in order to obtain admission to the Federation. The Act requires that each Ruler who applies for admission must, by means of such an Instrument, declare specifically the matters in respect of which he is willing to surrender his powers through the Crown to the Federal Government. The offer is one made to the Crown, and the Crown has full discretion to accept or reject it. If the offer is accepted, the State at once is incorporated as a federal unit, but only to the extent provided for by the declaration in the Instrument of Accession. Outside the range of those matters in which powers have been surrendered, the central government will have no authority over the State concerned. It is difficult to see how an Instrument of this kind can be construed as a contractual document : its only value to the States is that it is a piece of documentary evidence which indicates the measure of their accession and which the States would be able to rely upon in the case of any dispute brought into the Federal Court regarding the authority of the Federal Government to act with respect to a particular subject.

It had to be recognized that the only way of getting the States into a federation was by agreement ; the execution of an Instrument of Accession is the means which the Act provides for the expression of that agreement. The Provinces, on the other hand, do not enter the federation by agreement—they had no powers of their own which they could agree to surrender to the central body. The sum and substance of the author's complaint amounts merely to this, namely, that the Indian scheme was not drawn upon the lines of those adopted in other countries ; but the conditions governing the situation in India were wholly different and rendered such procedure impossible.

Again, the author disapproves of the proposed Constitution because the inclusion of the States in the Federation will serve to check the growth of democratic institutions : he thinks that Parliament should have dealt with the problem of British India quite apart from the States. But this was not feasible in view of the not inconsiderable field of subjects which had come to be matters of common concern to both parties. It was evident that even under the powers conferred upon the Indian Legislature previous to the Act the interests of the States were being gravely prejudiced by British Indian policy which they had no power to influence, and it was equally evident that the situation of the States was bound to become worse in the event of a further bestowal of powers on an Indian government. In these circumstances it was incumbent upon the framers of the Act to provide, as far as possible, for the removal of the legitimate grievances of the States by affording them the opportunity of securing association in the control of policy in the common field of interests. The Crown had long been bound by its pledge to protect the interests of the States, and there could be neither justice nor reason in breaking this pledge while fulfilling a pledge to accord self-government to British India. It is difficult to see what other course was open to Parliament in this respect. The Rulers are, both by tradition and temperament, conservative and have hitherto shown no inclination to depart from the forms of government they have inherited. But if Parliament is powerless to force them to alter their ways, it is unreasonable to blame it for resorting to the method of persuasion. At the moment of writing it is difficult to forecast the future of this scheme for an All-India Federation. The British Government is naturally desirous to secure the entry of the States into the Federation in view of the embarrassing situation which is likely to arise if the States prefer to remain outside. For in that event the Crown, while retaining its full paramount powers, will still rest under the obligation of protecting the integrity of the States—even against the aggression of an Indian government.

At an early stage of the deliberations which took place before the Bill began to assume shape some of the principal Rulers declared in favour of federation, but only on condition that full responsibility was to be given to the proposed central government. This declaration was welcomed at the time by some of the leading politicians of British India. But a change came over the situation as soon as it became apparent that Parliament was not prepared to concede responsibility at the centre. Enthusiasm for federation then gave way to opposition from both sides. In British India the feeling at the moment is one of open hostility to the admission of the States into any federal union. The avowed policy of the Congress party, at present in the ascendant, is to sever completely the British connexion with India ; it seems to be believed that with the British out of the way, the States would be obliged either to fall into line with the Provinces or to undergo absorption. Such a prospect can hardly be palatable to the States in general. It may be that the more powerful among them would view with equanimity the disappearance of the restraint imposed by the Paramount Power which would leave them a free hand to regulate their own destinies. They might well believe that in such an event they could look after themselves and resist successfully any attempts to bring about their extinction. They might even begin to entertain an ambition to extend their present frontiers and so recover territories which were once in their possession. But the smaller States would probably be less optimistic about their chances of survival. As matters stand any hope of collaboration between the States and British India appears to be remote.

Nor can it be said that the history of events in British India during the six months or so which have elapsed since the Act came into operation has provided the Rulers with any inducement to embark on a new political venture. In the majority of the British Indian Provinces the elections went in favour of the Congress Party, which at first refused to assume the responsibilities of office. Later it changed its mind, with the result that the administration of these Provinces is now in the hands of Ministers whose continuance in power depends upon their unqualified obedience to the dictates of a handful of the Congress leaders. The States' Rulers have thus been able to see democracy, as understood by the Congress, in action and may intelligibly be excused if they refuse to associate themselves with the scheme which the Act holds forth for their acceptance. All that can be said at the present juncture is that the omens are not favourable for an All-India Federation. To all appearances there is a complete absence of goodwill between the parties, no indication of that spirit of mutual accommodation which is the essential condition for the success of this great political experiment. The experiment may fail as the author prophesies it will. But if it does, the blame will not lie with the British Parliament, which in this Act has made an honest and earnest attempt to promote the interests and welfare of the peoples of India ; it will more properly be laid at the door of those whose intransigence will have served to frustrate the measures taken for their common benefit.

ADMINISTRATIVE LAW AND ADMINISTRATIVE JURISDICTION.

[*Contributed by* W. IVOR JENNINGS, ESQ., LL.D.]

So long as the view of Dicey prevailed that there was in England no such thing as administrative law, English students of public law were trying to do exercises in a strait waistcoat. If the common law were codified it would probably be found that two-thirds of English law—in bulk and not necessarily in importance—was administrative law. The result of the predominance of the Dicey school was that most of the modern law was being ignored by the academic lawyers, and the result of the growing acceptance of the fact (obvious to anyone who even glances through an American or continental book) that Dicey took one small part of French administrative law and ignored the rest has been to give a great impetus to the study of the problems involved in the growth of State activities. Even now it is not easy to persuade students to move out of their accustomed groove. Experience suggests that students tend to say that until recently there was no administrative law, but for reasons which they usually disapprove Parliament has delegated "legislative" and "judicial" functions to administrative authorities and that administrative law in England is thus growing apace. This attitude is partly to be explained by the fact that the problems studied by those interested in the subject have very largely been those of administrative justice. It was with these that Dr. Robson, in his *Justice and Administrative Law*, was primarily concerned, though Dr. Robson would be the first to deny that he accepted the Dicey view. Similarly, Dr. Allen was concerned with "Bureaucracy Triumphant" and the Lord Chief Justice with "The New Despotism." By far the easiest way to persuade students that administrative law means the law relating to the administrative authorities is to take them through the table of contents of such a book as Hauriou's *Précis Elémentaire de Droit Administratif*. The exercise will quickly convince him that after all there must be administrative law in England, and it is possible to point out that at p. 427 in a book occupying 457 pages Hauriou proceeds to what Dicey called *droit administratif*, namely, the jurisdiction and procedure of the administrative courts. Finally, it can be pointed out that all other Western European nations (it is unnecessary to get into the U.S.S.R. controversy as to whether there *is* any law except administrative law, especially if one does not wish to be suspected of Trotzkyism) have what they call administrative law, though very few of them have separate administrative courts. In particular, Belgian *jurisprudence* has by a series of important decisions of the *civil* courts since 1920 adopted the main body of French administrative law relating to *fautes de service.*

It is interesting to speculate why Dicey's confusion between administrative law and administrative jurisdiction has prevailed so long in England that it was even reaffirmed by the Committee on Ministers' Powers in 1932, when in fact a mere glance at the table of contents of a book on *droit administratif* would clear it up. The obvious explanation is, probably, that very few of those who took their constitutional law from Dicey took the trouble to find out if Dicey was right. This is indeed surprising considering that Maitland and Holland about the same time were giving expression to much more accurate notions, and the high-priest of English Jurisprudence, Austin, had given indications of what administrative law really was forty years before Dicey wrote. The explanation must be that Dicey's theory that English law was better than the rules which foreigners, who knew not liberty, laid down for themselves satisfied the English lawyer's traditional complacency, and that there was no Bentham to puncture the balloon of Blackstone's successor.

This confusion between administrative law and administrative jurisdiction is the subject of a doctoral thesis presented to the Royal University of Leyden by a Dutch student, Mr. S. O. van Poelje.[1] It is an excellent piece of work and deserves more than a passing notice. The author has been good enough to preface his thesis with a summary of ten pages in English ; but those who can are advised to return the compliment by reading the substance of the book in his own language. It will be found, to take an example, that there is no mention in the summary of the interesting suggestion that Dicey took his notion from Hearn, who wrote in 1867, and who merely quoted de Tocqueville to show that French administrative law both before and after the Revolution contained ideas which rendered it difficult to translate it into English. Dicey used almost exactly the same language in one of his most frequently quoted passages. Actually, Mr. van Poelje is not quite accurate in stating that *later* Dicey used the works of the French lawyers. It was in the first edition (and apparently Mr. van Poelje used no edition earlier than the tenth) that Dicey quoted the definition from Aucoc. He proceeded, however, to assert that this was "wanting in precision" and then defined *droit administratif* to mean *juridiction administrative.* In later editions he added material from the various writers from Laferrière to Hauriou without changing his original content. Here, certainly, is an Awful Warning to those of us who start to study a subject with preconceived ideas. Dicey took from Hearn and de Tocqueville the notion that *droit administratif* was something alien ; and nothing that anybody from Laferrière to Jèze said on the subject moved him to do more than make minor qualifications. Some of these qualifications (such as that referred to in Jennings, *The Law and the Constitution*, p. 206) were significant, but they did not change the real emphasis. Dicey's views were based essentially on the nature of French administrative law as it was considered to be before 1848. Mr. van Poelje quotes a passage from an article by the late Professor van Vollenhoven on *Omtrek van het administratief recht*: "There was a great difference between the administrative law of France before 1848 and that of the authors after 1848; the difference, namely, that the older writers confused administrative law with administrative jurisdiction, while the younger writers properly separated the two matters."

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[1] *De administratieve rechtspraak in Engeland,* door S. O. van Poelje. (Alphen A. D. Rijn, 1937.) Pp. xviii + 318.

Another example of a different kind may induce readers to study the book itself. There is in the English summary a sneer about an alleged change of opinion by Professor Laski between 1932 and 1935. It is, in my opinion, not justified by the documents, and it appears much less blatantly in the text itself. Even if the change of opinion had taken place, it would not justify the attribution of motive which Mr. van Poelje makes. After 1932 there were several published criticisms (to which the author does not refer) of the Report on Ministers' Powers; there were additional publications on the nature of administrative law (some of which the author does not quote); some work was done on the question with which Professor Laski was concerned, the use of common law bias to defeat the objects of social legislation; there was private discussion (though the author was not to know this) in the academic institution from which many of these publications originated; and, above all, the Supreme Court of the United States proved once more that Mr. Dooley was correct in at least one of his pronouncements. In fact I do not think that Professor Laski has changed his opinion on this point.

In his first chapter Mr. van Poelje considers the nature of administrative jurisdiction. He is fortunate in having at his command three languages besides his own. He gives a fair analysis of the different points of view, and in the end accepts more or less Bonnard's opinion. This has recently been considered in this *Journal*,[1] and the points there made need not be set out again. Mr. van Poelje might perhaps have considered Carré de Malberg's analysis of Kelsen in *Confrontation de la Théorie de la formation du Droit par degrés* as well as his more systematic exposition in *Théorie générale de l'Etat*, to which the author rightly draws attention. The present writer fully accepts Carré de Malberg's point of view, though it is essential, as Mr. van Poelje points out, to distinguish between functions and organs of government. The real question, however, is whether there is any substantial difference between the functions.

In his second chapter the author considers "the English conception of administrative law and administrative jurisdiction." Here it is pointed out that when Dicey expounded *droit administratif* in connexion with the " rule of law," he was in fact referring only to administrative jurisdiction and, incidentally, that he was attributing to the continent of Europe something which was limited to France. Nevertheless, Dicey's views achieved a great success; they were accepted by Bryce, Lowell, Sir John Marriott and the Lord Chief Justice. The author does not, I think, quote Jèze's statement that when Dicey was challenged about his conception of French administrative law he explained that he was too old to change it now; but he does quote from Berthélémy: " J'offris au maître anglais mon *Traité de droit administratif.* Dicey en lut le titre, puis me regarda bien en face en souriant : ' Droit administratif, dit-il, en scandant les syllabes, Nous n'avons rien de pareil en Angleterre. Nous ne voulons rien avoir pour but de protéger les fonctionnaires contre les citoyens; l'effort du droit étant surtout de garantir les citoyens contre les négligences et les abus possibles des gouvernants.' " Such is the force of preconceived ideas that Dicey attributed to English law an advantage which French law does and English law does not possess. To guarantee citizens against the negligence and abuses of government is exactly the function of the Conseil d'Etat. It mattered nothing that the famous Art. 75 of the Constitution of the Year VIII was repealed in 1875. Nor would that article matter much provided that there were (as there was and is in France) an adequate remedy against the Administration. There is in the English law of public health a similar protection to officials in s. 265 of the Public Health Act, 1875 (which applies to all the Public Health Acts, 1875 to 1932), and s. 305 of the Public Health Act, 1936. This provision does not apply to local government officials acting under other Acts, but it has never definitely been decided that such officials are liable (and similarly there is considerable doubt on the matter in most of the States of the United States) because nobody in his senses wants to sue the official when he can sue the local authority. The nearest approach to a decision on the point is (in England) *Mill* v. *Hawker*, (1875) L.R. 10 Ex. 92. Who would care whether or not he could sue a workman laying a telegraph cable if he could sue the Postmaster-General or the Crown ?

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[1] *Administrative Authorities and the Courts*. By W. Ivor Jennings, *Journ. Comp. Leg.*, Third Series, vol. xvii, pt. iv, p. 210.

Mr. van Poelje next proceeds to consider the critics of Dicey. Dicey himself marks the transition by his article in the *Law Quarterly Review* and by some comments in *Law and Opinion.* But he, like many of his followers, assumed that administrative law was entering English law by reason of the conferment of " judicial " powers on government departments. After him came a group of writers, especially Professor Morgan, who emphasized the immunities of public authorities, notably the Crown, and the provisions of the Public Authorities Protection Act, 1893. This school is best represented in Professor Berriedale Keith's edition of Ridge's *Constitutional Law,* which is not referred to by the author. There the editor sets out the " rule of law " and then adds a host of exceptions. It may be that exceptions prove the rule; but the exceptions are so numerous and wide that the more logical point of view is that here they deny the rule. Among this group, also, are placed Dr. Wade and Mr. Phillips. I think that the second edition of their *Constitutional Law* shows that Dr. Wade, at least, has moved away from this modified Dicey school. It is true, as Mr. van Poelje rather humorously points out, that the term " Law of Public Administration " is used ; in fact, however, there is a footnote explaining that this means administrative law, though there is no definition of administrative law. Also, the arrangement goes so far to meet the modified Dicey school as to emphasize (indeed, over-emphasize) the " legislative " and " judicial " powers of public authorities. Nevertheless, I think that careful reading shows that Dr. Wade comes off the fence. Dr. Robson, Professor Laski, Dr. Finer and the present writer (though only in respect of a review in *Economica*) also appear in this group. The others can speak for themselves, but the present writer certainly makes no claim to be classed with the eminent writers of the modified Dicey school. In truth, though there may not be agreement as to the desirability of a *separate* administrative jurisdiction, the published work suggests that Mr. Lawson, Dr. Wade and the four teachers of the University of London are in substantial agreement as to the content of administrative law.

The section devoted to " present opinions " is practically limited to the views of Mr. Gordon and Dr. Allen. These have had very little, if any, following ; and, in spite of their intrinsic interest, they can hardly be said to be typical. The only University which appears to have made up its mind on the subject is the University of London. The measure of agreement is, indeed, far wider than is suggested merely by the fact that four of its teachers agree in substance as to the nature of administrative law. Mr. van Poelje would probably have had a better idea of current opinions if he had begun with Professor Willis's very acute article on " Three Approaches to Administrative Law : the Judicial, the Conceptual, and the Functional," in Volume I of the *University of Toronto Law Journal.*

In his third chapter the author gives a survey of the administrative jurisdiction exercised by the courts (his use of the word " ordinary " in the English summary rather begs the question, and it is not in the title of the Dutch chapter). The survey is on the whole accurate. The analysis of the Crown is, however, not thorough enough. Maitland can easily lead a student astray ; and Mr. van Poelje relies somewhat upon Koulicher's article in the *Archives de Philosophie de Droit.* Koulicher is an acute jurist, but his article would be of more assistance if he had studied the details of English constitutional law. Further, I doubt whether the rules that " the King can do no wrong " and that " the King cannot be sued in his own courts " should be separated ; it would probably be found on investigation that the former was a method of expressing the latter, though the former has been taken further since *Tobin* v. *R.* Some attention might also have been paid to the cases on " natural justice " between *Errington* v. *Minister of Health* and *Horn* v. *Minister of Health.*

The fourth and fifth chapters deal with the appellate powers of government departments and of special administrative tribunals respectively. These also are done carefully, though possibly the Housing Acts provide better examples than some of those quoted. There is an interesting lesson to be learned from the transfer of appeals against demolition and closing orders from the Minister of Health to the county courts. Unfortunately there is nothing published on this (except the references in the Memoranda and Evidence to the Committee of Ministers' Powers), and it is not easy to gather information ; but it is the general impression of those engaged in housing administration that the result has not been wholly beneficial either to the citizen or to good administration. Finally, there is an examination of the prospects of administrative jurisdiction. The real problem is, of course, not whether a separate jurisdiction is in itself an advantage, but whether there is any other means of taking out of administrative law the individualistic bias of the common law. In other words, the problem is essentially the same in England as in Belgium. Professor Vauthier and others have advocated the setting up of administrative jurisdiction because, while Belgian case law now provides adequate protection for the citizen through the extension of the doctrine of "civil rights," it does not give the citizen an effective remedy for the breach of "administrative rights." With us, this would require a fundamental modification of the law relating to proceedings against the Crown (though the application of s. 26 of the Ministry of Transport Act, 1919, to the Trunk Roads may be the thin edge of a very desirable wedge). In addition, there is the problem of the interpretation of administrative statutes. It cannot be claimed that the interpretation of the Housing Acts, for instance, has been satisfactory ; and the restriction of appeals to the House of Lords, though cheapening litigation, has left administrative law at the mercy of a rather illiberal tendency in the Court of Appeal. The case for administrative jurisdiction, as Jèze has pointed out, rests on the special competence of experienced administrative judges.

It will be seen that, in spite of incidental criticisms, this is an excellent book. It would be most interesting to persuade an English lawyer of equal quality to go to France and to tell us not only what the administrative tribunals do and what writers say about them, but also to indicate how in practice they work and what results they achieve.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L., LL.D.]

The Empire and the Morocco Convention.—The unity in certain aspects of the Empire is curiously illustrated by the form of the treaty of July 29, 1937, terminating the British enjoyment of the system of capitulations in the French zone of the Shereefian Empire. The treaty is concluded for Great Britain and Northern Ireland, but it abolishes the system for all British subjects, including therefore those who are Dominion nationals and Irish citizens. On the other hand, it equally assures privileges to all subjects, protected persons, and companies registered in the Empire, including protected territories and mandated territories of all kinds, while, on the other hand, the privileges which it accords to subjects of the Sultan of Morocco are restricted to the United Kingdom, British colonies, protectorates, and mandated territories, administered by the government of the United Kingdom. It is interesting to note the use of the term "colonies." It is clear that it is intended to exclude the Dominions, and it may be taken that the difference between the colonies and the Dominions [1] is now so well known internationally that the bare term suffices. Yet, as the King unquestionably is abandoning rights of Dominion nationals, it might have been well to make the limitation clearer. The Statute of Westminster, 1931, has indeed excluded the Dominions from the position of colonies in Acts passed thereafter, but that does not touch directly the meaning of colony in international instruments. The French Government in return surrenders its rights in Zanzibar on just terms. The treaty has the merit of ending one more set of capitulations in the most satisfactory manner of an honourable agreement. Yet another instance of British action for the whole body of British subjects is to be seen in the Exchange of Notes of March 25, 1937, with Japan, arranging for the final liquidation of the time-honoured dispute regarding the position of the system of perpetual leases. It is plain that in neither case could claims have been made for the exclusion of Dominion nationals.

The Dominions and the Abolition of the Conventions in Egypt.—While the Dominions naturally refrained from participating in the alliance with Egypt which, of course, involves a definite obligation to give military, naval and air aid in the case of aggression, they shared formally in the Convention for the abolition of the capitulations in Egypt. It was clearly desirable that this should be the case, though it would have been possible for the United Kingdom in this case also to abandon the capitulatory rights, for no claim has been made or could be made that the right could be exercised separately for any Dominion. As a sign of the rather formal character of their participation, Australia and New Zealand as well as India were represented by the Under Secretary of State for Foreign Affairs and the Irish Free State by its representative at Geneva, while the Union sent a minister as well as its representative at Geneva. A slight anomaly may be noted in the fact that the British representatives were appointed for the United Kingdom only and did not, when signing, amplify that statement by making it clear that they signed for all parts of the Empire save the Dominions. This, on the other hand, was made clear in the Convention of Montreux, 1936, regarding the régime of the Straits, and it might as well be adhered to automatically. The procès-verbal of November 6, 1937, is in a different category ; dealing with the regulation of submarine warfare, the Dominions also signed, but it takes the form of an accord between governments. The Egyptian Convention inevitably records the King of Italy as Emperor of Ethiopia, but the assertion of such a title in an international general treaty does not amount to recognition of the conquest of Ethiopia *de jure* ; *de facto* recognition has already been accorded.[1] But Mr. de Valera's appointment of a minister to the King of Italy, Emperor of Ethiopia, involves recognition *de jure*, and a breach in the unity of Commonwealth action in foreign affairs as well as a violation of Art. 10 of the League Covenant. Since his decision was announced, negotiations for a general settlement with Ireland have been entered into by the British Government.

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[1] Newfoundland is in an anomalous position, but presumably also is excluded.

Provincial Power to Tax the Salaries of Dominion Officers.—It is perhaps surprising that in *Forbes* v. *A.-G. for Manitoba* the Privy Council [2] should have been asked to deny the right of Manitoba to apply its income-tax legislation to Dominion employees. The matter was really disposed of by the approval given in *Caron* v. *The King*,[3] which approved the decision of the Supreme Court in *Abbott* v. *City of St. John*.[4] It is true that Mr. Caron was a provincial Minister whose salary was taxed by the federation, but plainly the principle there laid down was wide enough to conclude the matter. The most that could be said for the appellant was that ss. 4–7 of the Special Income Tax Act, 1933, were *ultra vires*, since they purported to impose on the employer the duty to deduct the tax and pay it over to the province, and that these sections were so bound up with the rest of the Act as to render the imposition of the tax on Dominion officers invalid. The Privy Council, like Duff C.J.,[5] had no difficulty in holding that the sections of the Act had no application to the Dominion Government, which it treated as an employer outside the province, and therefore not subject to its jurisdiction on the principle recognized no less in *Croft* v. *Dunphy* [1] than in *Macleod* v. *A.-G. for New South Wales*,[2] relied on by Duff C.J. It is interesting to note that the Crown in the Dominion is thus assumed to have a local habitat outside Manitoba, presumably at the capital, Ottawa. Duff C.J. used the territorial limitation in another connexion also, for he pointed out that, if the Act were presumed to apply to the Crown in the Dominion, it would be *ultra vires* in so far as it made the deduction of the sum a legal discharge *pro tanto* of the amount due, seeing that thus the province would be dealing with a contract debt due outside the province contrary to the decision in *Royal Bank of Canada* v. *The King*.[3] These emphatic reassertions of the territorial limitation of legislation by the provinces are interesting. It is to be noted that the Supreme Court and the Privy Council alike insisted that the legislation impugned was obviously not aimed against Dominion officials, but was merely an exercise of normal taxing power applied to all residents. The Judicial Committee also negatived the contention that the Dominion power of taxation exercised in 1917 by the imposition of an income tax must be deemed so to occupy the field as to exclude the exercise of provincial power. The federal and provincial taxes could exist side by side without a clash. It may be added that a like ruling by the Supreme Court in the case of the application of the tax to the pay of an officer of the permanent forces [4] of the Dominion was not appealed against. The decision of the Privy Council [5] was naturally applied to the contention that the judges of Saskatchewan were exempt from provincial income tax. It is palpably impossible to find any impairment of judicial immunity in the fact that they are required to contribute to the provincial exchequer on the same basis as other subjects, just as in the United Kingdom they were subjected with civil servants to the reductions of income rendered necessary by financial stringency, an action which may be presumed to be given strong support by the ruling of the Committee. It accords, of course, with the well-known decision of the High Court of Australia in *Cooper* v. *Commr. of Income Tax for the State of Queensland* [6] and of the Appellate Division of the Supreme Court of the Union in *Krause* v. *Commr. for Inland Revenue*,[7] and the only surprising thing is that the appeal should have been brought, so hopeless was it to expect any other ruling.

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[1] See Keith, *The King, the Constitution, the Empire and Foreign Affairs*, 1936–7, pp. 132, 133.

[2] [1937] A.C. 260.

[3] [1924] A.C. 999.

[4] (1908) 40 S.C.R. 597.

[5] [1936] S.C.R. 40, 47, 48.

The Territorial Limits of Provincial Power.—The limited power of the provinces is further illustrated by the decision in *Provincial Treasurer of Manitoba* v. *Bennett*.[8] There it was ruled that the province could not exact succession duty in respect of a deposit in the Winnipeg branch of the Royal Bank of Canada, the testator who made the deposit having died domiciled in Minnesota, where the deposit was represented by a negotiable receipt, which his executors reduced into possession so that they could have sued on it in the province without taking out auxiliary administration.[1] The case of *R.* v. *Lovitt*[2] was distinguished on the score that the instrument there was declared to be non-transferable, apart from the fact that, as explained in *Provincial Treasurer of Alberta* v. *Kerr*[3] the probate duty there concerned was charged for the collection or administration of the property and was not, as in the Manitoba case, taxation pure and simple.

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[1] [1933] A.C. 156.

[2] [1891] A.C. 455.

[3] [1913] A.C. 283.

[4] *Worthington* v. *A.-G. of Manitoba*, [1936] S.C.R. 40.

[5] *Judges* v. *A.-G. for Saskatchewan*, (1937) 53 T.L.R. 464.

[6] (1907) 4 C.L.R. 1304.

[7] [1929] A.D. 286.

[8] [1937] S.C.R. 138.

The Situs of Property under a Trust.—A still more difficult issue is presented by the decision in *A.-G. of Nova Scotia* v. *Davis*.[4] The deceased had been domiciled in Nova Scotia, but died domiciled in Bermuda. He had created a trust fund for the benefit of his daughters, who also before his death had ceased to be domiciled in Nova Scotia. The Nova Scotia Succession Act as amended by c. 13 of the Statutes of 1936 was held to be apt to strike at all property including gifts *inter vivos* whenever made, and to affect the interests of the daughters in the fund. It is clear that the actual bonds, stocks, etc., constituting the fund were situate outside Nova Scotia, but the trust fund had been established with the Nova Scotia branch of a Montreal bank, and it was expressly provided that the matters connected with the administration of trust funds should be performed in Nova Scotia and fall within the jurisdiction of the Courts of Nova Scotia. Hence the Nova Scotia Court could hold that there existed a chose in action situate in the province on which the statute could operate. It has naturally been pointed out[5] that there is a difficulty arising out of the fact that property moveable or immoveable can for the purpose of determining situs as among the different provinces, in relation to a tax imposed by provincial law on property transmitted owing to death, have one situs only.[6] Plainly, if the actual bonds and stocks are situated, as in this case, elsewhere than in the province, they are liable to taxation, *e.g.* in Quebec. The obvious suggestion is that one province may tax the securities therein situated, while the chose in action, the right of action against the trustees in Nova Scotia by the beneficiaries, may be taxed in Nova Scotia. But there is the fact that according to English law the beneficiaries of a trust have not merely a right of action against the trustee, as under the law of New York as ascertained in *Archer-Shee* v. *Garland*,[7] but a real right against the stock, so that on this principle the only thing which would seem to be taxable in Nova Scotia would be the stocks if any there situate.

Conflicting Priorities under Federal and Provincial Law.—A very interesting problem was solved by the Supreme Court in *The Royal Bank of Canada* v. *Workmen's Compensation Board of Nova Scotia*.[8] The

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[1] *Crosby* v. *Prescott*, [1923] S.C.R. 446.

[2] [1912] A.C. 212.

[3] [1933] A.C. 710, 726.

[4] [1937] 3 D.L.R. 673.

[5] 15 Can. B.R. 664–6.

[6] *The King* v. *National Trust Co.*, [1933] 4 D.L.R. 465 at p. 467.

[7] [1931] A.C. 212, commenting on *Baker* v. *Archer-Shee*, [1927] A.C. 844.

[8] [1936] S.C.R. 560.

Bank Act of Canada by s. 88 allows banks to acquire rights and powers over certain products by loans made on security thereof, and the Court was clear that the legislation was properly within Dominion power. But the Workmen's Compensation Act of Nova Scotia imposed on employers the obligation to pay contributions to the fund for compensation, and assessments due were made a first lien on all the property of the employer. The issue, therefore, was whether the right of the Bank was superior to that of the Board, it being held that the assessment could be deemed a tax within provincial authority as direct taxation. The conflict was resolved by adoption of the principle of *C.P.R.* v. *Corpn. of the Parish of Notre Dame de Bon Secours*,[1] where the right of the Dominion Parliament to control the construction of a railway was asserted not to mean that the railway was thus taken out of the province so as to be exempt from its power to tax. It appears, however, that, if the federal Act had so provided, a prior charge could have been conferred on the bank without violating the constitutional powers of the federation.

Provincial Authority in Judicial Matters.—The difficult question of the power of provincial legislatures to confer judicial functions on magistrates of provincial appointment was raised once more [2] as regards the power given by the Domestic Relations Act, 1927, as amended to grant maintenance to a deserted wife. By a majority of three judges to two the Appellate Division of the Supreme Court of Alberta ruled this to be *ultra vires*, despite the fact that similar provisions exist in Ontario, New Brunswick, British Columbia and Saskatchewan, while Manitoba gives the power to a magistrate or the county court. The British North America Act, 1867, by s. 96 reserved to the Governor-General the appointment of the judges of the Superior, District and County Courts in each province, and there can be no doubt that, if matters appropriate to such Courts can be disposed of by magistrates, the principle of that section might seriously be infringed. The respect due to it has the recent recognition of the Privy Council in *Martineau & Sons Ltd.* v. *City of Montreal*.[3] On the other hand, it is true that in *French* v. *McKendrick* [4] it was ruled that merely to increase the jurisdiction of an inferior court without any other changes in its constitution or character did not convert it into a County or District Court within the meaning of s. 96; but this view seems impossible of acceptance as a general proposition. More to the point was the second contention adduced by Lunney J. that the powers conferred might be defended as corresponding to those exercised by justices of the peace before confederation.[5] It is, however, clear that the right to grant maintenance orders was not so exercised, and, though in *Dixon* v. *Dixon* [6] the right of British Columbian Court to grant a protection order was asserted, there is clearly a distinction of importance between the right to grant such an order which affects the separate property and earnings of a deserted wife and that to grant maintenance orders. Unfortunately the case was not carried to the Supreme Court, though the Attorney-General who intervened in the Alberta proceedings to defend the constitutionality of the Act was anxious to have it reviewed. The Appellate Division granted him leave to appeal and also granted leave to the wife in question, but on application to the Supreme Court that body had to decide that no appeal could lie by the Attorney-General, though he would be allowed to intervene if the wife cared to appeal. This she failed to do within the due time, and thus the issue remains open to reconsideration. The argument that such jurisdiction can conveniently be conferred on magistrates is no doubt strong, but the Appellate Division's legal contention is able.

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[1] [1899] A.C. 367.

[2] *Kazakewich* v. *Kazakewich*, [1936] 3 W.W.R. 699; *A.-G. for Alberta* v. *Kazakewich*, [1937] S.C.R. 427.

[3] [1932] A.C. 113.

[4] (1930) 66 O.L.R. 306.

[5] Cf. *In re Small Debts Recovery Act*, [1917] 3 W.W.R. 698.

[6] (1932) 46 B.C.R. 375.

Public Harbours.—An interesting elucidation of the term "public harbours" included in the property transferred under the British North America Act, 1867, to the Dominion is contained in *Jalbert* v. *The King.*[1] The issue arose from the action of the Dominion in taking possession of what the appellant claimed to be his property under a Quebec grant. The Exchequer Court accepted the view of the Dominion Government that the area was included in a public harbour at the time of confederation, and that accordingly the Quebec government had no power to make the grant in question. The Supreme Court overruled this decision. It held that there must be some physical characteristic distinguishing the location of a harbour from a place merely used for navigation; the mere fact that there were wharves and commercial activity along an open river could not constitute great stretches of the river a harbour. That term in the British North America Act could not include every little indentation or bay along the shores of all inland lakes and rivers as well as along the sea coast and the shores of the Great Lakes where private owners had erected a wharf, to which ships came to load or unload goods for commercial purposes. It was also ruled that the compensation payable to the dispossessed owner should be determined by the sum which would have been payable to him if expropriation proceedings had been taken in ordinary course, such proceedings naturally having been impossible from the point of view of the Dominion which asserted ownership of the area affected. The decision is clearly in keeping with the principle laid down by Lord Dunedin in *A.-G. for the Dominion of Canada* v. *Ritchie Contracting and Supply Company*,[2] where it was pointed out that both character and user must combine to make a public harbour, for the circumstances of formation and use were far from giving the area the nature demanded. The case raised a curious point of provincial right. The Attorney-General for Quebec appeared before the Exchequer Court to support the claim of the suppliant, and was allowed to take an independent appeal from the decision of that Court. But the Supreme Court pointed out that, as Quebec had never legislated to give the Exchequer Court jurisdiction in any dispute with the Dominion, as is possible under s. 31 of the Exchequer Court Act, that Court had no jurisdiction in the matter as between the province and the Dominion, and in any case the Court could not give relief to a province in a petition of right against the Dominion; hence no costs were allowed to the Attorney-General in respect of his appearance before either the Exchequer or the Supreme Court.

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[1] [1937] S.C.R. 91.

[2] [1919] A.C. 993, 1004.

Petition of Right in Tort.—The case of *Ludger Marcoux* v. *The King*[1] is of interest as showing the character of the right to sue the Crown in the Dominion in respect of the defaults of its servants. The obligation applies to servants of the Crown in public works, and it is clear that a post office is covered by this term, so that damages can be obtained for an injury caused by a slip while walking on a sidewalk, leading to the office, the caretaker having negligently in defiance of his instructions spread sawdust on the walk in lieu of sand, ice having formed on it. The damages, however, were mitigated under the rule that the person injured was found to have contributed by carelessness to his fall. It was held as settled that the rule applicable was similar to that affecting the relations of master and servant in respect of the responsibility of the former for the acts of the latter.

Copyright in Canada.—The much vexed question of Canadian copyright has been again raised in *Mansell* v. *Star Printing and Publishing Co.*[2] The point at issue was the existence of copyright in pictures painted or made outside Canada before January 1, 1924, when the Canadian Copyright Act, 1921, came into operation. The claimant patently had no rights under the Canadian Copyright Act, 1906 (R.S. c. 70), for that demanded production in Canada, nor under Imperial legislation, for that, as was ruled in *Graves and Co. Ltd.* v. *Gorrie*,[3] did not apply, in the case of paintings, drawings and photographs, to Canada. It followed, therefore, that no Canadian copyright existed when the Act of 1921 came into force, and the provisions of that Act providing substituted rights for existing rights could not help the claim. The only other argument available was that the grant of a certificate under s. 25 (2) of the Copyright Act, 1911, of the United Kingdom resulted in the Act of 1911 having effect to confer copyright in Canada. Needless to say, this suggestion was rejected by the courts. Historically the Act of 1911 marked the deliberate abandonment of Imperial legislation on copyright for the Dominions, and the power given in the section in question was merely that of giving to works produced in Canada protection in the United Kingdom.[4]

The Commonwealth and External Affairs.—The decision of the High Court in *R.* v. *Burgess*; *Ex parte Henry*[5] renders the position of Australia markedly different from that of Canada in regard to legislative power respecting foreign affairs, at least in the sphere covered by the operations of the Labour Organization of the Treaties of Peace. The Privy Council has reasserted in clear terms the view originally taken by the Supreme Court of Canada, when it dealt with the issue of the correct mode of dealing with the draft convention regarding hours of labour, namely, that Canada for the purposes of the procedure envisaged in the Treaties of Peace is to be deemed a federal State, the power of which to enter into conventions on labour matters is subject to limitations, that is, those arising from the fact that the legislative authority of the Dominion is limited in extent, and that the legislatures competent to deal with such issues are provincial. It must be taken from the decision of the High Court that this limitation cannot be deemed applicable to the Commonwealth, and that labour conditions could be regulated by the Commonwealth under international conventions as fully as air navigation, the arms traffic, or the control of dangerous drugs. While the other members of the Court were less outspoken in their pronouncements than Evatt and McTiernan JJ., yet all seem to admit enough to concede this power. There is, of course, a difference between power and action. It is plain that much trouble must arise if the Commonwealth invades the sphere of the States through legislation based on Labour Organization Conventions, for the decision in the aviation issue proves conclusively that the Commonwealth can legislate only in precise accord with any convention, and grave confusion might well result from a partial invasion of the field of State action. It is important to note that Dixon J. reaffirmed the rule that Commonwealth action to control interstate and external trade cannot extend to cover intrastate trade to the extent that federal authority has been ruled to apply in the United States. Further, it must be noted that the refusal of the electorate at the referendum on the Bills to confer full power in aviation matters [1] and to relieve the Commonwealth from the restrictions of s. 92 of the Constitution in its marketing schemes [2] constitute a distinct declaration that federal encroachments on the powers of the States are against the will of the people. The decision in the case of aviation is frankly surprising, but it may have been helped by the fact that voters were asked also to pass judgment on the proposal to strengthen the federal system of marketing natural produce, the effects of which have proved not wholly satisfactory to those concerned. The immediate needs of the situation regarding aviation are doubtless fully met by the amendment of the Act of 1921 so as to make it clear that it does not attempt to regulate intrastate aviation.

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[1] [1937] Ex. C.R. 23.

[2] (1937) 53 T.L.R. 1026.

[3] [1903] A.C. 496.

[4] Keith, *Responsible Government in the Dominions*, ii. 954 ff.

[5] (1936) 55 C.L.R. 608.

Australian Nationality.—The discussion of the regulations by the Court raised the point as to the definition of Australian nationals in view of the terms of Art. 7 of the Air Navigation Convention of 1919. The regulations actually issued did not depart from the British model, and curiously enough the meaning of one part of these regulations was misunderstood by the Court. The British regulations bracket with British subjects persons under His Majesty's protection, and it cannot be doubted that both the intention and the effect of this conjunction is to refer to that wide class of persons connected with countries which are under a British protectorate of any kind, so that those connected therewith are regarded as British protected persons internationally. They include the subjects of the Indian States, those of the Malay States, and so on, as well as the people of protectorates under direct administration by the Crown. The justices seem to have been led into error by Dixon J.'s [1] reference to the doctrine that resident aliens are under the protection of the Crown, as mentioned in *Johnstone* v. *Pedlar* [2] and many other cases. But every phrase in legal documents must be considered in its context, and there cannot be the slightest doubt as to the real intention of the words in the British Air Navigation Order.

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[1] Votes for, 1,924,946; against, 1,669,062; but only two States were for.

[2] Votes for, 1,259,808; against, 2,214,388. See *Journ. Comp. Leg.*, Third Series, vol. xviii, pt. iv, pp. 281, 282.

The Commonwealth and the Fugitive Offenders Act, 1881.[3]—The Commonwealth *eo nomine* is grouped with Papua, Norfolk Island, New Guinea, Nauru, New Zealand, Western Samoa, Fiji, the Gilbert and Ellice Islands, and the British Solomon Islands by Order in Council of October 12, 1925, for the operation of Part II of the Act of 1881. This grouping has caused some difficulty as regards the employment of the procedure of this Part to secure the handing over by New Zealand of offenders against the laws of the Australian States which control criminal law in Australia in general. It has been ruled in New Zealand, *Re Munro and Campbell*,[4] that the Part cannot be made operative in respect of a crime under State law, but must be confined to offences against Commonwealth law. If an offender against State law is concerned, action must be taken under Part I of the Act. It cannot be denied that this result is far from satisfactory as a matter of procedure, for the operation of Part II was expressly devised to simplify handing over offenders from New Zealand to Australia and *vice versa*. It is not surprising that the High Court of the Commonwealth has, with full consideration of the judgment of the New Zealand Court, held that in its view an offence against a law of a State forms an offence against Commonwealth law in the wide sense of the term, and that the form of the Order in Council is the only apt form. While, of course, the High Court cannot affect the ruling of the New Zealand Court, it has definitely laid it down that a State magistrate is a proper person to take action in respect of a fugitive offender from New Zealand.

State Admiralty Jurisdiction.—The same case is interesting because it raises once more the difficult question of the validity of the Admiralty jurisdiction exercised by the State Courts. It is significant of the trend of opinion that in *Union Steamship Co. of New Zealand* v. *The Ship Caradale* [5] Dixon J. declined to stay an action in Admiralty in the High

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[1] 55 C.L.R. 608, at p. 673. For the ordinary use of protected persons, see the Morocco Convention cited above.

[2] [1921] 2 A.C. 261, 273.

[3] *McArthur* v. *Williams*, (1936) 55 C.L.R. 324.

[4] (1935) N.Z.L.R. 159; *Re Munro*, 271.

[5] (1937) 56 C.L.R. 277.

Court in favour of a common law action in the Supreme Court of Victoria, partly because of this very doubt, which in that instance had induced the claimants to refrain from suing in Admiralty. The difficulty arises from the terms of the Colonial Courts of Admiralty Act, 1890, and the Constitution of the Commonwealth s. 76 (iii). The former Act (s. 2) confers Admiralty jurisdiction on any Court of unlimited original civil jurisdiction in a colony, and the Supreme Courts of the former Australian colonies duly exercised such jurisdiction, and retained it when the colonies were federated. It had indeed been suggested by Sir J. G. Latham[1] that the effect of the creation of the Commonwealth was to destroy the jurisdiction of the State Courts. The argument is based on the fact that the Act of 1890 in terms refers to the Courts in a British possession, and the Interpretation Act, 1889, s. 18 (2) provides that, where parts of the Dominions are under both central and local legislatures, all parts under the central legislature shall be deemed one possession. That being so, no State can be deemed a possession, and its Supreme Court cannot be said to have Admiralty jurisdiction under s. 2 of the Act of 1890, nor even to be capable of receiving such jurisdiction under s. 3, while the High Court of the Commonwealth is patently under the Act of 1890 automatically invested with Admiralty jurisdiction. The answer to this view seems to be that all that the Act of 1890 requires is that a Court should be in a possession, not of a possession, and the Supreme Courts of the States are in the Commonwealth, which is a British possession. But a real difficulty is raised by the wording of s. 2 which gives Admiralty jurisdiction to Courts automatically only if no declaration is in force in the possession declaring a certain Court to be a Court of Admiralty under the authority given by s. 3 of the Act. The Commonwealth Judiciary Act, 1903–34, s. 30A, confers Admiralty jurisdiction on the High Court, and it is therefore open to contend that by this action the Admiralty jurisdiction of the State Courts falls. But there is a difficulty here, for the reference in s. 2 is to a declaration under the Act, and such a declaration by a legislature is subject to reservation, or the insertion of a suspending clause, and no such formality was observed regarding the Commonwealth declaration which was naturally held to be justified under the Constitution. Plainly the view is tenable that the Commonwealth legislation is ineffective, as suggested in *John Sharp & Sons* v. *The Katherine Mackall.*[2] An alternative view is that the legislation is effective, but not being under the Act of 1890 is not apt to bring into force the condition which under that Act would terminate the jurisdiction of the State Courts, so that there would be State as well as Commonwealth jurisdiction. Or again it may be held that since the Commonwealth legislation the State jurisdiction is gone. For these views arguments can be made out, and it is not surprising that the justices in *McArthur* v. *Williams*[3] drew pointed attention to the difficulties of the position which demands legislation to clear it up.

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[1] *Australia and the British Commonwealth,* p. 108.

[2] (1924) 34 C.L.R. 420.

[3] (1936) 55 C.L.R. 324.

Whether this would be possible for the Commonwealth by adoption of the Statute of Westminster, it would be hard to say, for it might be held to involve a change in the constitutional powers of the federation and the States.

The Territorial Ambit of State Legislation.—This perennial question has received further elucidation in *Broken Hill South Ltd.* (*Public Officer*) v. *Commr. of Taxation* (*N.S.W.*),[1] where the question was whether New South Wales could exact taxation in respect of interest on the debenture of a Victorian company paid to another Victorian company, the debt being secured in part by a mortgage of land in New South Wales. The principle was neatly laid down by Dixon J.: " It is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation, or of any other liability.[1] This is entirely in the line of recent decisions such as *Colonial Gas Association Ltd.* v. *Federal Commr. of Taxation* [2] where the Commonwealth was held entitled to tax income derived by absentees from companies drawing income from Australia, for that decision accepts the same doctrine as that applicable to the States. The issue appears again in the important decision of the Privy Council in *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*[3] The issue there was whether the Victorian company was entitled to payment in full of debenture interest on the New Zealand borough council debentures, on which interest was payable at Melbourne, when the Victorian Financial Emergency Acts of 1931 and 1932 provided for reductions on interest payments on mortgages and other securities. The New Zealand Court of Appeal and the Privy Council were in agreement in negating the application to the payments of the Victorian Acts. They held that the proper law of the contract, the criterion which is essentially part of English law, was that of New Zealand, and that the House of Lords decision in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*[4] had not the effect of laying down that the law of place of performance regulated all matters of performance even to the extent of altering the obligation of the contract. That decision bore only on the question of the currency in which payment was to be made, and in the New Zealand case also it was accepted that the pounds of the contract were to be Victorian pounds. But the essential ground of decision of the New Zealand case adopted by the Judicial Committee was that the Victorian Acts could not properly be interpreted to apply to the debenture interest. Further, the New Zealand Courts could certainly not be expected to rule that New Zealand statutes regulating such borrowings and payments of interest thereon could be modified by Victorian Acts, or that Victorian law contemplated any such result as regards debentures charged on New Zealand rates, that is land. The result accords with the decision of the High Court of the Commonwealth in *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society*,[1] where on appeal from New South Wales it was ruled that the New South Wales Interest Reduction Act, 1931, did not apply to interest paid in that State. In the case of *Barcelo* v. *Electrolytic Zinc Company of Australasia, Ltd.*[2] the Victorian statute was deemed to apply mainly because the security for the debentures was a trust deed executed in Melbourne which provided for its construction by the law of Victoria. The case, it may be added, is a classical exposition of the doctrine of the proper law and the exceptional cases of the law of the place of performance as affecting incidents thereof or as imposing illegality.

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[1] (1937) 56 C.L.R. 337.

[2] (1934) 51 C.L.R. 172.

[3] (1937) 54 T.L.R. 5.

[4] [1934] A.C. 122.

The States and Excise Duties.—Another ingenious scheme of the New South Wales Government to aid agricultural interests has proved illegal.[3] Under the Flour Acquisition Act, 1931–3, the State was deemed to expropriate flour at a fair and reasonable price fixed by a committee, but it was left with the original producer who could either use it or sell it to others at a standard price fixed by the Governor in Council at a rate considerably higher than that regarded as due to the original owner. The difference between the two amounts was to go to the State for distribution to aid agriculturists. The High Court naturally held that, whatever the merits of the scheme, it was simply no more or less than an excise and therefore forbidden to the State. The decision is, of course, strictly in accordance with those in *The Commonwealth* v. *South Australia*[4] and *John Fairfax & Son* v. *New South Wales*,[5] though it was suggested that the fact that the original owner was not compelled to use or sell the wheat, but might simply hold it at his own risk pending sale by the government and payment by it of what it fetched, might make the transaction defensible as a mere act of State business. But the Court naturally looked at the substance of the affair, and it noted that in fact no such holding took place, for the obvious reason that it would be an extremely bad piece of business for any owner thus to act.

Dominion Courts and Judgments of the English Court of Appeal.—A very interesting point is raised in the decision of the High Court in *Cowell* v. *Rosehill Race Course Ltd.*[6] The plaintiff in that case bought a ticket for a race meeting, but after he had entered the company revoked the licence to enter, and on his refusing to depart ejected him without using undue force. The claim was, of course, laid in tort, since the damages in contract would doubtless have been small. To encourage the claim stood the Court of Appeal's decision in *Hurst* v. *Picture Theatres Ltd.*,[7] which laid it down that a licence to see a spectacle was irrevocable as it was coupled with an interest, namely, the right to see, though under *Wood* v. *Leadbitter*[8] a mere licence not coupled with an interest is revocable. It is, of course, accepted by the High Court [1] that, where the matter is one of English law pure and simple, the proper course is to accept the ruling of the Court of Appeal, which presumably would be that of the House of Lords. Evatt J., who dissented from his brethren, held that it would be wise to accept the Court of Appeal's ruling, and from a broad point of view there is much to be said both for that doctrine and for the acceptance of *Hurst's Case* despite criticism as a useful principle of law, preferable to the older views. Looking broadly at the matter, it seems unreasonable to give no adequate remedy for unfair treatment of a spectator, and the technical difficulty may be ascribed to adherence to too narrow a view of equitable remedies. But the majority of the Court held that the decision in *Hurst's Case* was so manifestly unsound that they were not required to follow it. There is thus created deliberately a difference between Australian and English law and one not likely soon to be removed, if at all. It is worth noting that in refusing leave to appeal in *Sodeman's Case* [2] the Judicial Committee alluded to the fact that it was being asked deliberately to consider the laying down of a doctrine for the Dominions which would depart from the considered ruling of the Court of Criminal Appeal in *R.* v. *Flavell* [3] and *R.* v. *Kopsch* [4] that the defence of uncontrollable impulse is not known to English law. It may be added that in *Fraser* v. *The King* [5] the Supreme Court of Canada gave leave to appeal from a decision of the King's Bench, appeal side, Quebec, because a *prima facie* case was made out that that Court was interpreting in a manner less favourable to the accused than the English rule,[6] followed in other Courts in Canada,[7] the conditions of conviction on circumstantial evidence.[8]

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[1] (1934) 50 C.L.R. 581.

[2] (1932) 48 C.L.R. 391.

[3] *A.-G.* (*N.S.W.*) v. *Homebush Flour Mills Ltd.*, (1937) 56 C.L.R. 390.

[4] (1926) 38 C.L.R. 408.

[5] (1927) 39 C.L.R. 139.

[6] [1937] A.L.R. 273.

[7] [1915] 1 K.B. 1.

[8] (1845) 13 M. & W. 838.

The Court of Appeal and the Privy Council.—In view of the interesting discussion of the discrepancy of views between these two authorities by Mr. Justice Ford,[9] it may be well to note that on one important issue the views of the Privy Council have been restored to undisputed authority. In *Fanton* v. *Denville* [10] the three justices of the Court of Appeal were critical of the decision of the Privy Council in *Toronto Power Co.* v. *Paskman*,[11] regarding it as not in harmony with the true English law as to the defence of common employment, and Greer L.J. stated that being a decision on the law of Canada, the Court of Appeal were not bound to follow it. It now appears from the Scottish appeal, *Wilsons and Clyde Coal Co.* v. *English*,[1] that, while on the facts the decision in *Fanton* v. *Denville* can be supported, some of the dicta therein are contrary to authority. Lords Thankerton, Wright and Maugham expressly rehabilitated the Privy Council decision as an accurate declaration of the law of England. The result is satisfactory, for the divergence of view of the Court of Appeal was naturally disturbing as to the authority of the Privy Council on English law.

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[1] Cf. *Sexton* v. *Horton*, 38 C.L.R. at p. 244.

[2] (1936) 55 C.L.R. 230; [1936] W.N. 190.

[3] (1926) 19 Cr. App. R. 141.

[4] (1925) 19 Cr. App. R. 50.

[5] [1936] S.C.R. 1; the conflict between the Quebec and other Courts on further investigation appeared not to be real, 296; see s. 1025 of Criminal Code.

[6] (1838) 2 Lew. C.C. 227 in *Hodge's Case*.

[7] *R.* v. *Yok Yuen*, (1929) 52 Can. Cr. Cas. 200.

[8] The Ontario Court of Appeal does not always accept the view of the Court of Criminal Appeal: *R.* v. *Kadeshevitz*, [1934] O.R. 213, accepting the evidence of a witness despite a prior affidavit to the opposite effect, dissenting from *R.* v. *Leonard Harris*, (1927) 20 Cr. App. R. 144.

[9] *The Alberta Law Quarterly*, ii. 5–12, citing *Journ. Comp. Leg.*, Third Series, vol. xv, part iv, pp. 261, 262.

[10] [1932] 2 K.B. 309.

[11] [1915] A.C. 734.

The Legislative Power in Northern Ireland.—An inconvenient result, though one legally inevitable, has been reached by the decision of the House of Lords in *Gallagher* v. *Lynn*,[2] on appeal from Northern Ireland which normally sends no appeals. The system of milk control adopted there involves naturally inspection of dairy premises, and as a result Donegal farmers who were wont to send supplies to Londonderry have been precluded from continuing thus to act. It was, therefore, contended that under the Government of Ireland Act, 1920, s. 4 (7) the legislation was *ultra vires* as dealing with trade with a place out of Northern Ireland. But the House of Lords stressed the fact, that looking at the pith and substance of the legislation,[3] it was legislation for the health of Northern Ireland and not legislation as to trade with the Irish Free State. It is clear that the matter might profitably be adjusted by some accord between the two governments, but unhappily that seems not yet in sight.

[1] 106 L.J.P.C. 117.

[2] [1937] A.C. 863.

[3] *Russell* v. *R.*, (1882) 7 App. Cas. 829, at p. 839.

NOTES.

Civil Procedure in Italy.—The Italian Codes are being drastically revised, and the Code of Civil Procedure is now to be dealt with. In an interesting pamphlet Dr. Michele Gaetano De Rossi urges that this is a great opportunity for seeing what can be learned from foreign systems.[1] In recent years, so far as comparative law is concerned, Italy has been in the forefront. Foreign laws have been studied there to a greater extent than in most countries. Now, surely, is the time to show that these academic studies can be turned to practical account.

As to French law, on which Italian procedure is largely based, one may assume that it will not be overlooked. And the close contact with Germany and with Austria will, probably, ensure that due attention is paid to their laws. It is less certain that a serious attempt will be made to profit by the comparison with English, or, shall we say, Anglo-American procedure. Dr. De Rossi thinks it would be a mistake to leave English procedure out of consideration.

To support this view he gives a brief analysis of the English law of evidence, taking as his text the recent short book of Professor J. H. Wigmore, and making some shrewd comments.[2] He thinks some of our rules as to admissibility of evidence would not be suitable for Italy. He appreciates the fact that the English procedure in civil suits is now about as simple and expeditious as can be expected.

Rightly enough, he points out that this was not always the case. Before the New Procedure came in there was plenty of what Dr. De Rossi calls " the primitive mysticism and formalism of the Germanic peoples." As an illustration he refers to ordeals, and to the famous case of *Ashford* v. *Thornton*.[3] But here he is, quite unintentionally, rather misleading. The reader might suppose that up to 1819, ordeal by battle was a common affair in England. Speaking of ordeals, he says " such methods of proof remained profoundly rooted not only in the popular consciousness, but also in the practice of the law." We might remind our Italian friends that " appeal of murder " was an extremely unusual thing. It was as rare as it was primitive. When William Ashford threw down his glove on the floor of the court and said " Not guilty, and I am ready to defend the same by my body," there was, we may be sure, *sensation dans*

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[1] *Brevi Note sulla Prova nel Processo Anglo-Americano* (*Estratto dall' Archivio Giuridico*, vol. cxvii, *Quarta Serie*, vol. xxxiii, *Anno* 1937–xv).

[2] *A Student's Textbook on the Law of Evidence.*

[3] 1818, 1 Barn. & Ald. 405.

l'auditoire. And when Ashford "got away with it" the shock to public opinion led to the prompt abolition of this bit of archaic law which Sir William Holdsworth tells us had been practically obsolete by the end of the thirteenth century. As a surprise, *Ashford* v. *Thornton* was rather as if a man going out to shoot a rabbit had flushed a pterodactyl.

If an outsider may venture to express an opinion, I would suggest special consideration of the difference between Italian and English practice as regards the examination of witnesses. This is hardly touched upon in Dr. De Rossi's pamphlet, but it is, clearly, of great importance. A good deal of our law may be unsuitable for export, but there is nothing esoteric about this, and it might be fitted into any system of law. In our view, and American lawyers would agree, no method of extracting the truth, and also the untruth, from a witness is so effective as examination and cross-examination conducted by counsel in open court before the judge, or the judge and jury, at the trial of the case. The usual method in Italy, as in France, is to have the evidence taken on commission by a judge appointed for that purpose—*juge commissaire*—*giudice delegato.* This commissioner sits, as a rule, in a private room. He interrogates the witnesses and writes down the questions and answers, and he notes also objections made by counsel. His report is then sent in as a *procès-verbal* to the court which is to try the case. The commissioner (if I am correctly informed) does not report his opinion as to the honesty or intelligence of the witness.

Under this system the court never sees the witnesses, nor does the commissioner who has seen them sit with the court. All that the court has to go by is the *procès-verbal,* and the long written arguments of counsel supplemented by oral arguments at the trial. This strikes us as very unsatisfactory. Experience proves that cross-examination in open court is of the utmost value.

We have all seen many a witness come into court confidently, and deliver in a persuasive way a well-prepared statement. We have seen the same witness leave the box, after cross-examination, utterly discredited, with his evidence torn to shreds. If, in the reform of Civil Procedure in Italy, full opportunity were given to the advocate to make use of the great art of cross-examination, that would be, I venture to think, a great improvement. But, to achieve its purpose, the cross-examination must be before the court which decides the case. The judge must see the witnesses and decide as to their credibility and capacity. No *procès-verbal* can take the place of this.

F. P. WALTON.

The Accused: An International Survey.[1]—In October 1937 the Assembly of the League of Nations passed the Report of the Fifth Committee, which contained, *inter alia,* a resolution that the Secretary-General should be instructed to collect advice and suggestions from specified sources on the measures which might be proposed to protect witnesses and persons awaiting trial against the use of violence and any other forms of physical or mental constraint. This resolution was prompted by the fact that several delegates had urged the desirability of such a course, and in securing this public support the Howard League must receive its due share of the praise for its work in publishing this Survey, to which the attention of jurists in all parts of the world should be drawn. The document consists of two parts: a memorandum urging the Fifth Committee to draw the attention of the League to the serious and increasing evil of the use of torture and emphasizing the need not only of a scientific approach to the problem but also of the establishment of good machinery to grapple with the subject; and a summary of the replies received from nearly eighty countries to a series of questions dealing with the topic of the custody of prisoners awaiting trial. This latter portion is admittedly incomplete, as some of the printed endorsements on it and letters to the Press after its publication bear witness, but it ought to provide a strong incentive to the collection and the submission of further information on the subject.

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[1] *The Howard League for Penal Reform.* London, 1937.

The covering memorandum emphasizes that the evil is an existing and a growing one, and that it is one to which no civilized country is ready to admit that it has recourse. This suggests one of the difficulties which confront those who attempt to make a scientific survey of this nature. The evil is generally one operated in secrecy. Practices may diverge widely from laws. Public rumours are frequently met by strong official denials. The exact nature of administrative orders on the subject may be difficult to discover. The Howard League does not pretend to have done more in this Survey than to collate the best information which it could get, and it could not in the circumstances do more. It expressly invites more information. Altogether apart from the difficulties of securing information, it was faced with the difficulty of comparing exactly the procedure of countries with different legal systems, in particular those which have and have not the institution of the Juge d'Instruction. The difficulties are enhanced by the known fact that in some countries there is a class of persons who cannot be described as prisoners awaiting trial, but who are deprived of their liberty by administrative orders or otherwise. Exact information on this topic is scarce for reasons which need no emphasis.

The four questions which form the basis for the replies given in the Survey were: (1) Who has the custody of an untried prisoner (*a*) before he is brought before any examining magistrate or other judicial authority, (*b*) during the preliminary investigation by the examining magistrate or other judicial authority? (2) Are there any rules restricting the interrogation by the police of the untried prisoner (*a*) before he is brought before, (*b*) during the period in which he is under examination by, the examining magistrate or other judicial authority? (3) Is there, in law or in practice, any limit to the time (*a*) before a prisoner is brought before an examining magistrate or other judicial authority, (*b*) before a prisoner is brought to trial? (4) What is the procedure in cases where the arrested person is not brought before any judicial authority?

On the fourth question, the replies relating to the following countries are of special interest: Germany, Austria, Bulgaria, Esthonia, Northern Ireland, Greece, Italy, Latvia, Lithuania, Poland, Portugal, Russia, India and Venezuela. It is impossible in a short review to give any adequate indication of the value of the information on this and the other questions. It must suffice to state that the document is an invaluable storehouse of information, despite its fragmentary nature, on the subjects with which it deals.

D. R. S. D.

The Schuster Library of Comparative Legislation.—In 1936 the Society of Comparative Legislation presented to the British Library of Political and Economic Science (London School of Economics) the collection of works on comparative and foreign law formed by the late Sir Ernest Schuster and originally placed on deposit at the London School of Economics in 1925.

The Schuster Library of Comparative Legislation contains standard works on jurisprudence and comparative law, a representative selection of codes, works dealing with the law of foreign countries, particularly France and Germany, and long runs of the relevant periodicals. Important new works are added as they appear; the Society makes regular donations of the material it receives and does not require; and a number of the more important periodical files are maintained up to date. All regular members of the Society of Comparative Legislation are entitled to use the collection upon making application to the Librarian.

Until recently the collection, which is housed in the Law Library at the School, was shelved in one straightforward run arranged alphabetically by authors, with rough sheaf-catalogues for "subjects" and "countries," but the works in the collection were not included in the Library's main Author (General) Catalogue.

Such an arrangement had serious disadvantages. In the first place, the omission of the collection from the Library's main Author (General) Catalogue was most misleading to students working in the field of comparative law. A consultation of the Library's catalogue frequently led to the assumption that particular works were not in the Library, when, in fact, one or more editions were to be found in the Schuster Collection. In the second place, whilst a straightforward alphabetical arrangement by author may be the best for general English law books, a similar order for the whole of foreign and comparative law was quite illogical and far from satisfactory. It is an axiom of library administration that works which are shelved on "open access" to readers should be arranged in an order which shall have some relationship to the use for which readers are likely to require them.

Early in 1937, accordingly, the Library made arrangements to catalogue the Schuster Collection and, in preparation for the work of cataloguing, devised a scheme of classification which it was felt would render the collection of greater service to readers.

Under this classification seven distinct divisions of law have been agreed upon and assigned the numbers (1) to (7): (1) Codes, statutes, etc.; (2) Private Law; (3) Commercial Law; (4) Civil Procedure; (5) Industrial and Labour Law; (6) Criminal Law and Procedure; (7) Public Law.

The works on comparative law, that is, works dealing with the law of more than one country, will be placed in one group at the beginning of the collection and will be divided within that group according to the seven divisions enumerated above. The works in each of the seven divisions will then be arranged alphabetically by author.

All the remaining works in the collection will be arranged according to the countries to which they relate; within each country they will be subdivided according to the same seven divisions, and again within each subdivision they will be arranged alphabetically by author. In the country arrangement, countries will be identified by "Dewey country numbers," since these numbers are used for the country arrangement of books throughout the whole Library, and since they have the advantage of keeping the countries together by continents.

The task of cataloguing and classifying the collection according to this scheme has now been begun. When it is finished (which it is hoped will be before the end of January 1938) a reader wishing to work on, say, the law of France will find all French law together arranged in the seven groups according to the seven main divisions of the law. On the other hand, a reader interested in, say, comparative commercial law, can go to the first group of works on comparative law and there consult all those bearing the number (3), *i.e.* commercial law; thereafter he can go to all the country groups and from each group again pick out all the works numbered (3).

It is felt that this classification will thus satisfy readers interested only in one country, and readers interested only in one aspect of the law, as well as readers interested in general comparative law. The catalogue cards will also bear the "country number" and the "law division," so that the finding of a book on the shelves should present no difficulties.

Tribute must be paid to Professor R. S. T. Chorley and Dr. O. Prausnitz, who, in the initial stages of the work, gave the Library much practical help and advice in this rearrangement of a valuable collection.

W. C. DICKINSON.

Grein v. Imperial Airways Ltd.—It is notorious that the unprecedented development of methods of transport during the last few decades is productive of legal problems often of almost insoluble complexity. Goods, passengers and the vehicle itself may come within the jurisdiction of several widely differing systems of law in the course of a single journey. It is true that a court faced with such a situation can usually find an answer to the immediate problem with the aid of the appropriate system of private international law. But the solution reached is often quite unpredictable, and while it may satisfy the lawyer, offers little comfort to the layman victim who has all unwillingly provided the legal conundrum. Indeed, the very existence of differing systems of private international law only adds to the complexity of the practical difficulty. The unification of private laws provides the ideal solution, but one often difficult if not impossible of accomplishment. A third method is to be found in the field of public international law, namely the conclusion of international conventions by which a uniform legal régime for limited purposes may be superimposed upon the municipal laws of the State concerned.

The operation of this third method is singularly well illustrated by the decision of the Court of Appeal in *Grein* v. *Imperial Airways Ltd.* [1937] 1 K.B. 50; but this case also reveals a weakness inherent in this method, for though the international convention may serve to impose rules on the courts of the high contracting parties who have embodied it in their municipal laws, the fact remains that those rules must be applied and therefore interpreted by municipal courts. Those interpretations may be such as to defeat the very purpose of the convention, unless the judges are prepared to approach the cases with that purpose constantly in mind.

The present case involved a construction of the Convention of Warsaw of 1929 on Air Carriage, and which was put into force in this country by the Carriage by Air Act of 1932 (22 & 23 Geo. V, c. 36). The convention imposes a uniform system of law governing " international carriage . . . by aircraft for reward," under which the liability of the carrier for accidents is limited to 125,000 francs, there being an absolute liability where the carrier is unable to prove that he has taken " all necessary measures to avoid the damage." In other words, all difficult questions revolving round a duty to take care were disposed of by the simple device of shifting the burden of proof to the carrier and compensating by a limited liability.

G. had taken a ticket from London to Antwerp and back with an agreed stopping place at Brussels. The ticket was issued in three parts: the first G. was to deliver up at his departure, the second at the place of destination and the third he was to keep. The fare was stated to be four pounds for the outward journey and two pounds eight shillings for the return trip. If he did not return within fifteen days he was to be entitled to a refund of the two pounds eight shillings. On the return journey from Antwerp G. was killed, and the widow now sued under Lord Campbell's Act. It became necessary, *inter alia*, to decide whether the trip was " international carriage " within the meaning of the Act, where international carriage is defined as follows (reproducing the convention):

> . . . any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty . . . of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty . . . of the same High Contracting Party is not deemed to be international for the purposes of this Convention.

At all material times Great Britain was, and Belgium was not, a party to the Convention of Warsaw. Lewis J. held that this was not international carriage, and the defendants appealed. The Court of Appeal was divided, Greer L.J. holding that the appeal should be dismissed on all points, while Greene L.J. with Talbot J. held that this was international carriage. It is instructive to contrast the arguments adopted by the respective Lord Justices, for in their method of approach lies the clue to the differing answers which they gave.

Greer L.J., approaching the problem of whether there had been a contract for two journeys, one from London to Antwerp and the other from Antwerp to London, or whether there was but one journey from London to London via Antwerp, said :

> If I take a ticket at Euston for Liverpool, Euston is my station of departure and Liverpool my destination, whether I take a single ticket or a return ticket. Suppose, for the sake of illustration, I have taken a return ticket. The porter at Euston asks me what is my destination, my answer would be Liverpool. If I ask him what are the stopping places on the journey he would probably in most cases say Rugby and Crewe ; he would certainly not say Liverpool. It would, in my opinion, be a misuse of language to describe the journey I was about to take as a journey from Euston to Euston with a stopping place at Liverpool.

The interpretation suggested by this hypothetical conversation between the Lord Justice and an imaginary porter at Euston leaves unsolved, as the Lord Justice admits, the very problem which the Convention was intended to solve, *i.e.* the question of what law shall be applied in case of accident, but excuses this on the strange ground that in any case " this problem is definitely not solved in the case of a return ticket from Antwerp to London, nor in respect of a single ticket either way." In other words, since the usefulness of the Convention is necessarily limited by the fact that not all states have become parties to it, why bother to apply it at all ?—an argument disquieting indeed to the international lawyer.

Greene L.J. came to the opposite conclusion, for he argued not in the abstract, but on the basis of the assumption that the Convention was concluded not merely to make so much more law, but with a definite purpose in view. He says at the beginning of his judgment :

In approaching the construction of such a document as this Convention it is, I think, important at the outset to have in mind its general objects so far as they appear from the language used and the subject-matter with which it deals. The object of the Convention is stated to be "the unification of certain rules relating to international carriage by air." By "unification of certain rules" is clearly meant "the adoption of certain uniform rules," that is to say, rules which will be applied by the courts of the High Contracting Parties in all matters where contracts of international carriage by air come into question.

After this summary of the general objects of the Convention he then proceeds to construe it in detail, and points out that according to the language of the Convention itself, the unit is not the "journey" at all, but the "contract," and "the question is not 'is the contract a contract for two carriages' in some abstract sense; it is—'is the contract a contract for two carriages for the purposes of the Convention,' which is a very different thing."

Talbot J., having come to the same conclusion independently, found it "strongly supported by the exposition of the objects and scope of the Convention with which Greene L.J. has prefaced his judgment."

The two methods of approach need only to be stated to reveal which is the most desirable, and, indeed, essential if the work of international lawyers is not to be entirely frustrated. There is, of course, only one way in which absolute uniformity in the application of such a convention as this can be secured, and that is by taking all cases to one international tribunal. But the expense involved for the litigant would in most cases be prohibitory and such as to defeat the objects of the Convention. However, if national judges set about their task in such cases with the broad outlook of which the judgment of Greene L.J. is an exemplary pattern, a workable system will be produced.

R. Y. JENNINGS.

Common Law and Civil Law.—Sir Maurice Amos illumines everything which he touches. His wide knowledge and the clarity and charm of his writing are very manifest in his paper on "The Common Law and the Civil Law in the British Commonwealth," read at the Harvard Tercentenary Celebrations. Among points of special interest to which he draws attention are the inquisitorial character of Common law Civil procedure as compared with that in Civil law jurisdictions and the numerous recent enactments by which Civil law principles have been extended to Common Law countries. In England undoubtedly we no longer answer "*una voce quod [nolumus] leges Angliæ mutare quae usitatæ sunt.*" Perhaps in no long time Consideration, Contributory Negligence and the principles of the Coronation cases may disappear from our law under the impulse of the same spirit which gave us Adoption, Legitimation by subsequent marriage and the wider range of marriage illustrated by 7 Edw. VII, c. 47, and 11 & 12 Geo. V, c. 24, to say nothing of other even more recent and impending examples.

Upon the same topic reference may also be made to Professor Sarfatti's article in the July number of the *Bulletin de Législation Comparée*, dealing with the influence of Roman and Anglo-Saxon (*i.e.* English) Law each upon the other. Professor Sarfatti's essay is of more historical a character than that of Sir Maurice Amos, but he also notes modern innovations in each body of law due to the influence of the other. In these examples we do indeed see the study of comparative law bearing fruit.

F. M. G.

Revue de droit international et de législation comparée.[1]—The death of M. le Baron Rolin-Jacquemyns has inflicted a severe loss both on this Review and on the literature of international law. No. 2 of the 1936 volume contains a sympathetic tribute to the memory of this distinguished Belgian jurist. The greater part of the volume is devoted to questions of public international law. Of articles of this type may be mentioned that of M. Jean Ray on the reform of the Covenant, who denounces the current tendency to attribute weakness to the Covenant on the ground of its universality, also, a study by M. Tenekides on the interesting but difficult problem raised by " les actes compromissoires concurrentes," and its solution in the realm of jurisdiction. Professor Clyde Eagleton discusses the recent American neutrality legislation. M. Seferiades argues strongly against the admissibility of pacific reprisals. M. Herz discussing the decision of the Germano-Polish Arbitral Tribunal of August 1, 1929, and M. Raestad in a more general study, make learned additions to the already abundant literature on recognition. M. Goedhuis writes on international airways, and M. Hammarskjold explains the position with regard to the procedure for taking advisory opinions by the League and proposals arising out of the present doubtful character of the law on the subject.

M. Gordon on convoy of neutral merchantmen by belligerent warships is scholarly ; Professor Garner on the value of the laws of war is optimistic. Three articles from the stimulating and learned pen of Professor de Visscher repay careful study. Two deal with questions of public international law—the Straits Convention, 1936, and " le droit pénal international en matière de navigation aérienne." The third, on " la technique juridique de la personalité juridique en droit international public et privé," draws attention to the different approaches to the problem by public and by private law. Two very interesting though rather abstract articles by Dr. Rundstein discuss with freshness and precision a somewhat worn topic—" La structure du droit international privé et ses rapports avec le droit des gens." In the field of commercial law the articles of M. Stoupnitzky on " Le statut de l'U.R.S.S. commerçant dans le droit conventional soviétique," and of M. Charley del Marmol on " Le droit corporatif de la vente commerciale," break new ground.

J. M. J.

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[1] Third Series, vol. xvii, 1936.

L'Egypte Contemporaine, Nos. 165-71 (Nov. 1936-May 1937).—In February 1936 the Mixed Court of Appeal held that the Mixed Courts had no jurisdiction to determine as between the Caisse de la Dette, the bondholders and the Egyptian Government whether the Government was bound to pay its debt in gold or could pay in Egyptian paper.[1] The legal grounds upon which this decision rests have been much canvassed and are doubtless open to argument. But the decision was certainly a happy one and would by most be considered just as between the bondholders and the Egyptian taxpayers. But, of course, the bondholders were disappointed and some of them seriously inconvenienced. It was not surprising in the circumstances that the Crédit Foncier Egyptien had declined to pay its bondholders on a gold basis. And three days after the decision in favour of the Government, the same Chamber of the Appeal Court held that the company was justified in so refusing.[2] A Décret-loi of May 2, 1935, had declared void "all gold clauses stipulated in contracts involving international payments quoted in Egyptian pounds, pounds sterling or any other currency recognized in Egypt." In the circumstances this provision was held to apply to the claims made by the bondholders. The decision is discussed and approved by M. Mazeaud in an article in the issue of *L'Egypte Contemporaine* for Nov. 1936, which appears to be reproduced from Dalloz and is well worth attention. Unhappily the French courts have adopted a contrary view on the same issue (April 3, 1936). Space is lacking here for discussion in detail, but upon the general issue it may well be doubted whether it is in the public interest that creditors should be able to shelter from an economic tempest behind a gold clause.

In the number of the same Journal for February 1937, Dr. Abd el Fattah el Sayed considers the lines upon which the impending revision of the Egyptian penal law should proceed. Numerous recent Codes are laid under contribution, but the eclectic method is surely not very helpful in this sphere. It is astonishing and disheartening to find no reference to the valuable work done some fifteen years since by Sir John Percival and his Commission. It is to be hoped that the new Penal Law Commission appointed in March 1936 and due to report this March is not neglecting the very relevant and important draft Code and Commentary prepared by their predecessors. Sir John Percival and the late Judge A. C. McBarnet, upon whom the bulk of the work fell, had long and varied experience of Egyptian conditions and were otherwise remarkably equipped for the task in hand. It will be a great loss to Egypt if adequate account be not taken of their labours.

F. M. G.

Columbia Law Review, Nov. 1936–June 1937.—The number for December 1936 contains twin essays on Soviet law (J. N. Hazard) and the Fascist Conception of Law (H. A. Steiner). Each seeks to present the basic ideas respectively underlying the Marxist and the Fascist conception of law. Of the two Mr. Hazard is the more successful in his task; perhaps it was the easier one. Mr. Fraenkel, in the issue for February 1937, postulates the question "What can be done about the Supreme Court?" His reply takes the form of a business-like article in which he briefly discusses all practicable suggestions, and concludes that neither (*inter alia*) to alter the personnel of the court nor to limit its powers of juridical review would prove a satisfactory solution. The best choice is to make it easier to amend the Constitution. The courts, necessary as they are, may well become a danger to social peace if an effective power is not closely following in the wake of their decisions and making good the damage. In the March number Professor Llewellyn continues his discussion of the Warranty of Quality and Society commenced the previous May. Why does he conceal his learning and insight under so strange a growth of facetiousness?

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[1] *Gaz. Trib. Mixt.*, xxvi, No. 126.

[2] *Ibid.*, No. 127.

F. M. G.

South American Reviews.—From the National University of La Plata we have received Nos. 52 to 54 of vol. 14 of the Revista de Identificacion y Ciencias Penales—a review dedicated to Criminology and especially the Science of Identification. Our readers will already appreciate the excellence of this publication, and this volume is no exception. It may be mentioned that it includes a Bibliography by Antonio Herrero, and a short History of Arabic Penal Law by Prof. Dr. Ladislas Thot.

The Library of the Faculty of Law of the same university sends us the first volume of the draft Code of Penal Procedure, ending in an Index, pp. 326. This volume, which seems a complete draft of oral justice, appears not to be confined to codification but to aim also at amendments in the existing procedure, which is recognized as in many departments to be unsatisfactory, and as usual many supplementary laws await incorporation.

From the same library come two volumes devoted to the preparatory work for the amendment of the Civil Code, one of 818 pages and the other of 494, both indexed. For this work the Academic Council of the Faculty, with the approbation of the Superior Council of the university, appointed the Institute of High Studies, the members of which, bearing distinguished names, contributed the individual sections into which the books are divided.

From Lima have come the first numbers of the Review of Law and Political Sciences, under the editorship of Dr. Pedro M. Oliveira, Dean of that Faculty in the University of St. Mark. In this country also a new Civil Code is in prospect, and to this subject four articles are dedicated. A specially interesting article is that on the historical origins, etc., of the Law of the Incas, by Dr. Jorge Basadre.

Wyndham A. Bewes.

NOTICES OF BOOKS.

INTERNATIONAL LAW.

The fifth edition of the second volume of this magistral work dealing with disputes, war and neutrality, also edited by Professor Lauterpacht, was reviewed by the author of the present note, in this *Journal* for February 1936. It is hardly too much to say that all persons who are familiar with Oppenheim's treatise, in whatever part of the world they may be, have been waiting eagerly during the past two years for the appearance of the new edition of volume one.[1] Those who are aware of the enormous amount of work which the preparation of the new edition has required will agree that two years was none too long a period of time for the execution of the task.

In the preparation of the fifth edition of volume one the editor has followed the general plan of procedure which he adopted in the preparation of his edition of volume two. He is still convinced that it is wholly impracticable in the editing of a work such as Oppenheim's treatise to distinguish between the author's text and that of the editor, so that it would be possible for the reader to identify in all cases what was Oppenheim's and what the editor's. Those who wish to know what the author's views were in a particular question may find it necessary, therefore, to consult the third or, preferably, the second edition. As in the case of volume two, the editor has found it necessary to make many alterations in the text and to add much new material in order to bring the work up-to-date in respect to both the subject-matter and the present state of the law. In some cases the editor has deemed it desirable to adopt positions and express opinions different from those of the author or the preceding editors, considering the changes and developments in the law which have taken place in recent years. But where it was practicable he has indicated in the text or in a footnote the discordance between his own view and that of the author or the earlier editors.

The alterations and additions which have been necessary in the present volume are considerably more numerous than those which were necessary in volume two because of the fact that while the international law of war and neutrality, with which the latter volume deals, has undergone relatively little change since the publication of the fourth edition (1926), the law of peace, especially as it is found in international conventions, has greatly expanded since that date. To deal with these changes and developments the editor has either rewritten or added to the present edition some fifty new sections. In order to find the necessary space without unduly enlarging the volume he has suppressed about one hundred pages of text and footnotes in the fourth edition and the publishers have adopted a smaller type, so that the present edition does not exceed materially in size the preceding edition.

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[1] *International Law.* A Treatise. By L. Oppenheim. Vol. I: Peace. Fifth Edition, edited by H. Lauterpacht. (London: Longmans, Green & Co., 1937.) Pp. lvi + 819. 45*s*.

It is quite impossible within the limits of this review to discuss in detail Professor Lauterpacht's own contributions of new material to the present edition, to comment on the views which he there sets forth or to indicate all the points upon which he expresses opinions which differ from those of Professor Oppenheim or the earlier editors. It must suffice, therefore, to call attention only to a few of the more important controversial matters of international law concerning which his own conclusions may be of interest to the readers of this review.

Regarding the sources of international law, he expresses the opinion that in the absence of anything approaching the common law doctrine of judicial precedent, decisions of international tribunals are not a " direct " source of law in international adjudications, but in fact, as he admits, they exercise considerable influence and are referred to by the Permanent Court of International Justice with increasing frequency, although the Court is precluded by its statute from treating its prior decisions as binding (p. 28). As to the authority of text writers as subsidiary sources, he thinks that with the development of an international jurisprudence and a more abundant practice of states it is natural that reliance on the authority of text writers as evidence of international law should tend to diminish (p. 30). As to the relation between international and municipal law, he thinks the doctrine that the former is now a part of the law of the land is a rule of positive law and that it is impossible to accept the view that it does not become such until it has been expressly adopted by municipal action (p. 40). As to the view of certain Latin American jurists that there is a special body of " American " international law, he thinks that as yet there has not developed any such body of international law, possessing distinctive peculiarities of its own, although he admits that it is possible that special problems of the American continent may necessitate in the future a departure from some of the rules and principles accepted and applied elsewhere (p. 48). Likewise he rejects the commonly accepted distinction between the so-called Anglo-American and continental schools, since there is not, in fact, he thinks, any clear lines of divergence at present between them in respect either to the law of peace or of war (p. 49). With regard to the codification of international law, he shows no great enthusiasm either as to its desirability or possibility. Certainly it cannot be maintained that codification is everywhere and at all times and under all circumstances opportune. He admits that codification may clear up many questions of law which have heretofore been matters of controversy, but at the same time it will create new controversies (p. 59). As to the recognition of new governments, he appears to be an advocate of the theory that recognition is constitutive in effect, and for this reason, apart from the weight of practice, he finds it difficult to admit that recognition is an entirely discretionary act governed by political considerations of self-interest (p. 122). In this connexion he appears inclined to sympathize with the view for which in our opinion much can be said, that a new government which is obeyed by the bulk of the population may justly claim a right to be recognized by other states (p. 130).

These are a few of the matters upon which the opinions of Dr. Lauterpacht are sometimes at variance with those of Oppenheim and of other text writers. The writer of this note, however, finds himself generally in accord with Professor Lauterpacht's conclusions, believing, as he does, that they are supported by considerations of reason, by the weight of recent practice and by the doctrine of some of the most authoritative of contemporary writers.

What was said in the review of Professor Lauterpacht's edition of volume two of Oppenheim's treatise regarding the high character of the editor's work can be said equally of his edition of the present volume. Although an extremely difficult task, he has done it in admirable fashion. He has brought Oppenheim's extensive bibliographies up-to-date, added many valuable footnotes, rewritten and clarified much of the text and added a vast amount of new and interesting material. His extraordinary familiarity with the literature of international law, his knowledge of the recent practice, his keen and brilliant intellect and the patient and almost meticulous carefulness which he has bestowed upon his task are qualities which are revealed upon nearly every page that he has touched in the preparation of the new edition. As a result, Oppenheim's treatise in its present form is an outstanding work on international law not only from the point of view of its content, scope, authoritativeness and up-to-date character, but from the point of view of its adaptability and usefulness for the purpose of study and consultation. As such, it may be doubted whether there is any other treatise, at least in the English language, which is likely to be so widely used by all persons who are concerned with the study, teaching or practice of international law.

To the writer of this note it seems especially fitting that just as the distinguished editor was bringing to completion his task of putting this monumental treatise into the form in which we now have it, he should have been chosen to the Whewell professorship of international law at Cambridge—a position which Oppenheim himself filled with distinction for so many years. That the honour was worthily bestowed all those who are familiar with Dr. Lauterpacht's learning and work will readily agree.

James Wilford Garner.

PRIVY COUNCIL PRACTICE.

SINCE the second edition of this valuable book [1] appeared in 1926, the jurisdiction of the Privy Council has been extended in one important aspect by the enactment of the Government of India Act, 1935, establishing a Federal Court for India. It was obviously the intention of the framers of this Act to give to His Majesty in Council a final voice in the construction of this impressive statute, since it provides for an appeal to the Privy Council both from the original and the appellate jurisdiction of the Federal Court. It may confidently be predicted that with the coming into force of the Indian Federation, the Privy Council will be called upon to interpret some of the more important sections of the new Indian Constitution in the same manner as it has already done so remarkably in the case of the Canadian Constitution. A new right of appeal to the Privy Council is also given in constitutional cases by the Government of Burma Act, 1935.

On the other hand, the Statute of Westminster may well prove to have had the effect of restricting appeals to the Privy Council, since it entitles the Dominion legislatures to curtail, or even abolish altogether, the right of appeal to the Judicial Committee. The Statute has already been invoked by Canada for the purpose of abolishing appeals in criminal matters and by the Irish Free State in all matters.

The great usefulness of Mr. Bentwich's book amongst practitioners is further enhanced by this edition, which brings up to date all the decided cases as well as all the Rules and Orders in Council passed since 1926. In such a carefully prepared edition there are very few criticisms which could be made. It might, however, be pointed out that the statement at p. 86 that :

> . . . where an Indian Act gives a right of appeal to the High Court, an appeal from the decision of the High Court lies under and subject to the Code of Civil Procedure

should be qualified by the important reservation that it is only when the High Court is appealed to in the course of its *ordinary* jurisdiction that an appeal lies to the Privy Council. There are Indian Acts, such as, for instance, the Land Acquisition Act, 1894, which give a right of appeal to the High Court subject to the Code of Civil Procedure, but from which nevertheless there is no appeal to the Judicial Committee, because the High Court in such cases is not acting as an ordinary Court of Justice. The decision in *Hem Singh* v. *Das* (63 I.A. 180 and not 158) was not a case "under the Provincial Insolvency Act" (as there quoted), but involved, in fact, an appeal from the tribunal appointed under the Sikh Gurdwaras Act, 1925, to adjudicate on religious trusts.

C. JOHN COLOMBOS.

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[1] *The Practice of the Privy Council in Judicial Matters.* Third Edition, by Norman Bentwich. (London : Sweet & Maxwell.) Pp. xxiv + 353. 35s. net.

THE MACHINERY OF DEMOCRATIC GOVERNMENT.

MR. WILLIAM EDWARDS, sometime head master of Middlesbrough High School, has written a concise and stimulating book [1] for those students or laymen who want to understand without too heavy research our constitutional developments from 1760 to 1935. As he reviews the outstanding changes in the influence of the Crown, the working of the party system, the office of Prime Minister, the power of the Cabinet and other features within his period, Mr. Edwards embellishes his narrative with apt little quotations from contemporary pessimists. We hear the Attorney-General announcing in 1794 that it is " high treason for any man to agitate for the establishment of representative government, the direct contrary of the government which is established here." We hear the Duke of Wellington in 1831 declaring himself unable to see what is to save Church or property or colonies or the union with Ireland or, ultimately, monarchy itself, if the Reform Bill passes. Here is Lord John Russell, by no means the most determined of die-hards, opposing the ballot and regarding universal suffrage as " the grave of all temperate liberty and the parent of tyranny and licence." When Gladstone brings in his Bill for the further extension of the franchise in 1884, Lord Salisbury is heard prophesying that it will lead to " the absolute effacement of the Conservative party." Asquith in 1911 observes that " the grant of Parliamentary suffrage to women would be a political mistake of a very disastrous kind." But somehow the worst refuses to happen. The spirit of tolerance and compromise prevails. Logic is not allowed to drive us to extremes. If the pendulum swings, it presently swings back again. Historians have said that, by the Reform Act of 1832, Grey made the House of Commons the effective instrument of the popular will. The " supremacy of the sovereign people," Mr. Edwards warns us, remains largely illusory while so many electors refuse to bear their share of government by exercising their right and duty of voting at election times. Nor is Parliament an entirely efficient instrument. As early as 1848 Lord John remarked that it had become difficult for a Government to bring on important measures at a time when they could receive fair deliberation. That difficulty, says Mr. Edwards, is now so great that the House of Commons is often unable to perform its task of criticizing and controlling the Executive. The Cabinet, he continues, is almost a dictator. He blames the Cabinet (not, be it noted, the departments) for the growth in delegated legislation. He suggests that we might limit the " system of administrative government," which has " gradually grown up contrary to the spirit of the Constitution," by requiring departmental orders to be confirmed by a Committee of the House. This plan, however, while increasing rather than relieving the pressure on members' time, might uncomfortably impair the principle of ministerial responsibility and cramp the freedom of judicial review. The pitfalls in departmental regulations are not always visible at first sight: actual experience of their operation reveals the unexpected. He notes that recent years have seen statutes embellished with the "conclusive evidence" provisions which give "unjustifiable powers to a Minister or his department." But the "conclusive evidence" formula is visible as early as the eighteen seventies; surely there are occasions—the Extradition Act Orders in Council, for instance, or the orders for acquisition of land or borrowing of money for public purposes—where the need of finality is an ample justification. He refers too to the "Henry VIII clause" (for removal of difficulties) as something inconsistent with the supremacy of Parliament, though at least it is directly based on Parliament's express authority. On these alluring topics of the new despotism and bureaucratic encroachments his next edition might perhaps include in its bibliography that valuable State document, apparently more closely studied in the United States than the United Kingdom, the 1932 report of the Committee on Ministers' Powers. Not that Mr. Edwards has allowed much to escape him in compiling this judicious introduction to modern democratic government. His book is the more suitable for educational curricula because it is happily free from dogmatism, bias or partisan propaganda.

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[1] *Crown, People and Parliament*, 1760–1935. By William Edwards. (London: Arrowsmith.) Pp. 247. 8*s*. 6*d*. net.

C. T. C.

THE STATUTE-BOOK AS THE MIRROR OF ENGLAND.

Students of the statute-book may sometimes have had the fancy to publish an anthology of its quaint humours. Mr. Stewart Fay has turned the fancy into fact.[1] What is more, he has linked together his selected curiosities with a commentary which allows the legislation of each period, repressive, paternal or otherwise, to reflect as in a mirror the ideas and conditions of the time. He describes the hard cases which have occasionally led to good laws. He points out queer survivals still unrepealed. They furnish the usual reminder of the English reluctance to scrap what is old. Roger Casement is convicted under a Treason Act of 1351, two judges making a pilgrimage to the Record Office to look at the Norman-French original. A Welsh chimney-sweep, firing a revolver in a Bangor street in 1903, is sent to prison under an Act of 1328 which forbids men great or small to go or ride armed by night or day. Mr. George Lansbury, during the suffragette campaign, is bound over under an Act of 1360, which declared the jurisdiction of the justices of the peace over rioters and barrators. The Stoke Poges Golf Club case in 1915 turns upon the meaning of a statute of 1381 about forcible entry. Gladstone, wanting to create a suffragan bishopric, reawakens a sleeping Act of Henry VIII rather than give the impression of innovation by introducing a new law. What a pity that Parliament in 1627 ruthlessly repealed the mediæval statutes against liveries. Had they been left in the cupboard till 1936, they might have been brought out to restrict the wearing of political uniforms; no need in that case to seem to invade immemorial liberties by anything so revolutionary as s. 1 of the Public Order Act.

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[1] *Hanged by a Comma.* By E. Stewart Fay. (London: Lovat Dickson Ltd., 1937.) Pp. 276. 8*s.* 6*d.*

If, as some advise, the young should be taught a little law, Mr. Fay's sprightly pages would make a not unattractive textbook. Boys and girls would soon know all about premunire and habeas corpus, ordeal by battle and benefit of clergy, common informers and body-snatchers, the *ejusdem generis* rule and the mystery of regnal-year citation (20 & 21 Vict. cap. 50 and all that), witchcraft and inclosures, gaming and Sunday observance. Old or young, there is learning for all. The book has remarkable range and accuracy. Misprints are few. When it is rightly recorded that the statute-book ignores Cromwellian law-making, it would have been of interest to add that some Acts of the Commonwealth reappear, respectably enough, as laws of Charles II—enactments, for instance, about usury, highways, the Post Office, navigation, tobacco-planting, and even Lord's Day observance. Mr. Fay has a common-law distrust of departmental rules and regulations. This, in these days, might lead to an overloaded statute-book. But his book will help the cause of statute law revision which, after handling the pre-Hanoverian statutes most tenderly at two previous encounters, is now sharpening its axe for another attack. The running headings to his chapters are sometimes awkward. Chapter V is labelled "The Lambeth Poisonings," though we do not reach this topic before the last two of its seventeen pages. The title of the book itself is deplorable. The words "Hanged by a Comma" are dragged from Mr. Fay's narrative of the Casement prosecution. Their undue prominence seems almost to impute futility and unfairness to a trial wherein it was correctly decided to construe the Treason Act "without reference to commas." The worst of the title is that it will disappoint the would-be purchasers of a detective story, while the light of a good popular account of the statute-book will be hidden under a bushel.

C. T. C.

PUBLIC CORPORATIONS.

It is significant that two books[1] have been published almost at the same time to give an account of examples of a method of organizing the public ownership or a control of a business or service under the direction of corporations constituting a new form of government by commission. The conception is not entirely unknown in England and found expression in the nineteenth century in bodies to deal with the poor law, public health and other social services, while in the United States there are such important federal agencies as the Interstate Commerce Commission, the Federal Power Commission, the Federal Radio Commission, *et cetera.*

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[1] *British Experiments in Public Ownership and Control.* By Terence O'Brien. (London: George Allen & Unwin.) Pp. 304. 10s.

Public Enterprise and Developments in Social Ownership and Control in Great Britain. Edited by William A. Robson. (London: George Allen & Unwin.) Pp. 416. 12s. 6d.

Mr. O'Brien's book has been prepared under the auspices of the Institute of Public Administration, while Dr. Robson has edited his collection of studies by various authors for the Fabian Research Bureau. The difference between the aims and objects of the bodies provides the distinguishing characteristics of the two volumes. Educated at Oxford, Mr. O'Brien was for five years in the United States and during that time paid two visits to Russia and was Tutor and Instructor in Government at Harvard University. Upon his return to England he was Lecturer in Modern History at Balliol College. His book provides a scholarly and judicial survey of the constitution and activities of the Central Electricity Board, the B.B.C. and the London Transport Board. These three have been chosen because they possess common characteristics: (i) they represent public ownership of major services or economic undertakings; (ii) their function is not merely regulation or supervision but the production of a commodity or service; (iii) the area of their operations is national in scope, or, in the case of the London Passenger Transport Board, so vast as to give it a status of more than regional significance; (iv) they are granted monopolistic privileges by statute and are at the same time placed under definite obligations and limitations with respect to the nature and scope of their operations and the structure of their finances; (v) their management is entrusted to a specially appointed Board which enjoys a large measure of freedom in the organization and conduct of the service; (vi) they are removed from direct and continuous political control, while (vii) arrangements are made for the full operation of public control. The scheme of study pursued in examining the work of these bodies is comprised under twelve headings: the origins, functions, economic and financial status, the constitution of the Board, its operations, the responsibility to Parliament, followed by an examination of the internal operation, including the Board and the management, the staff, the decentralization of its functions, the advisory bodies and the relations with the public. The main object of the book is to provide material and formulate issues which may assist the construction of future theory, and the book so admirably fulfils its purpose that it will be recognized as a reliable treatise by anyone who desires to obtain a clear and accurate grasp of this important development in resolving "the conflict, inherent in a democratic system of society under existing conditions, between 'democracy' and 'efficiency.'" Mr. O'Brien has not attempted to elaborate a theory of the manner in which these and similar bodies should ideally be constructed and carry on their operations. That aim to some extent has inspired the general conclusions drawn by Dr. Robson from the descriptions provided by different contributors of the same three corporations, together with the Port of London Authority, the Forestry Commission, the Coal Mines Reorganization Commission, the Agricultural

Marketing Boards, the Post Office and the organization of the Co-operative Movement. Although neither Dr. Robson nor his colleagues have refrained from criticism he reaches the conclusion that electricity supply, broadcasting, metropolitan transport and the docks and harbours of London have been substantially better managed and developed by their respective boards than would have been the case if the task had been given to a Government department or left to the unregulated competition of private profit-making ownership. In considering the relationship of these bodies to Parliament Dr. Robson considers it to be " obvious that a full-dress debate at least once a year is needed on each of these socialized services," and in this Mr. O'Brien is in agreement. Both desire the development of some effective methods of criticism by means of some permanent organs of scrutiny and investigation. Mr. O'Brien would have a body either quasi-judicial or consultative which Dr. Robson would constitute in the form of an Audit Commission, though its duties " would be incomparably wider in scope than the narrow accountancy check which now goes under that name." Its proposed range of activities would be so extensive that the Commission might always be subject to a tiresome form of interference, so that the purpose of its original constitution would seem to be in danger of being destroyed altogether. Too many of Dr. Robson's proposals, in fact, seem to be in the nature of material for political propaganda. Finally, he proposes the constitution of some central planning super-organization to co-ordinate the activities of these various bodies, which would be placed under the jurisdiction of a Cabinet Minister free from other duties or a committee of the Cabinet. He is afraid that without a reasonable degree of public control there may develop a situation " which may easily get out of hand from a democratic point of view, and lead us to a society not far removed from the authoritarian state." He concludes that " the future of socialization " lies quite definitely in the direction of the public board, though only subject to the introduction of " the safeguards and ultimate controls " advocated in a wide range of suggestions, while to Mr. O'Brien it appears that the method of reposing power in a body of public servants conducting the service as trustees for the nation offers a " considerable chance " of producing effective service. It is clear from both studies that these corporations are providing a type of organization arising from the practical need and the development of government following the years of war. This growth has been experimental and in due course some modifications may be necessary. In the meantime the information provided in these volumes will be welcome to those concerned with similar problems in the Dominions and the United States, and these corporations may even provide suggestions to those foreign countries willing to adopt the English method of reconciling conflicting aims and ideals by means of compromise and trial characteristic of the British genius.

C. E. A. B.

THE COMMERCE CLAUSE.

It is now well recognized that the interpretation of a statute is no automatic process. A wide variety of conditions determines the twist given by the courts to its meaning—among them the nature of the individual problem presented by the litigation, the political and economic circumstances of the time, the foresight of the judge, the nature of his mental process, the bias of his judgment. With a detailed statute such as a Housing Act or a Companies Act the free play of these factors is limited; but there is no such limitation where general phrases stand without elaboration and almost unrelated, as in the Constitution of the United States or, indeed, in any Constitution. The judge in such circumstances has almost a virgin field, and the future development depends largely on the quality of the first settler. When once the process of interpretation has begun, however, the rule of precedent, while not necessarily compelling any particular line of development, limits in some degree the free choice of the judge. The man from Mars may land where he pleases. If he lands in Birmingham he may go north, south, east or west, but at least he must start from Birmingham.

The Commerce Clause is an excellent medium for studying the nature of the judicial process, and there is no student so competent as Professor Frankfurter.[1] Starting from the power of Congress "to regulate Commerce with foreign Nations and among the Several States," the Supreme Court of the United States has reached (with assistance from other constitutional provisions) the New Deal cases. The book consists of three lectures delivered on the Weil Foundation in the University of North Carolina. It is not a full investigation of history, but an examination of the work of the three Chief Justices who had most to do with the fixing of the main principles of interpretation—Marshall, Taney and Waite. Professor Frankfurter's wide learning enables him to place each decision in its background, to place each judge in his environment and to estimate the influence which each decision and each judge has had. "The study of constitutional law," he quotes from James Bradley Thayer, "is allied not merely with history, but with statecraft, and with the political problems of our great and complex national life." While admitting the greatness of Marshall's genius, he is fully alive to his defects. He studies Taney free from the prejudices created by the Dred Scott case, and places him second only to Marshall. Yet in some ways his study of Waite, the least eminent of the three, is the best part of the book. For the first time under Waite the court "had to respond to the impact of the modern current of social legislation." To deny the significance of Waite is "to allow the pedestrianism of his opinions to obstruct understanding of a great judge." The style of his judgments was in part due to the confusion of his own mind. "The difficulty with me," he wrote to Field J., "is that I cannot give the *reasons* as I wish I could." It would be interesting if other judges would explain how often they find difficulty in giving the reasons for decisions which they have already taken. But his style was due also to his desire not to follow Marshall's example in making forays over the borderland between law and politics too far from his base. To use the author's metaphor, "he hugs the shore of fact." That he was not always successful in sticking to his last (to use yet another metaphor) is shown by *Munn* v. *Illinois*, 94 U.S. 113, which is not only "among the dozen most important decisions in our constitutional law," but also a magnificent example of judicial technique. Anyone who has spread himself over from the English law of public utilities to the American finds himself in a strange field which is yet vaguely familiar. Its characteristics are derived from a single statement of Lord Hale's. It is as if seed from an English meadow had been carried by the wind to a tropical plantation, and in the course of many seasons buttercups and daisies had turned into trees.

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[1] *The Commerce Clause.* By Felix Frankfurter. (Chapel Hill: the University of North Carolina Press. London: Humphrey Milford, Oxford University Press, 1937.) Pp. 114. 4*s.* 6*d.*

Examples such as these show that, even for those to whom the behaviour of the "Nine Old Men" is simply the subject of bewildered admiration, this is a fascinating little book. It is an excellent essay in true sociological jurisprudence, the study of the working of legal institutions in the background of social conditions. W. IVOR JENNINGS.

CHIEF JUSTICE MARSHALL.

THIS brief autobiography of Chief Justice Marshall [1]—it is only about 7,000 words in length—has only recently come to light. It was in the possession of the widow of Mr. Justice Story's grandson, and was sold and so discovered, after her death in 1932. The first purchaser was Professor Liberma of Rome, and from him it passed into the possession of the William L. Clements library at Ann Arbor, where it now is.

The document appears to have been written in 1827 in response to a request by Story, who at the time was writing for the *North American Review* a review of Marshall's *History of the Colonies*, and who seems to have thought that the contemplated review offered an opportunity to present a sketch of the life and public services of the Chief Justice.

The autobiography is a straightforward and succinct account of Marshall's life from his birth in 1755 to his appointment to the office of Chief Justice in 1801, recording, very briefly, his services in Washington's Army, and the part he took as an ardent Federalist in procuring the adoption of the Constitution, in the controversy over Jay's treaty with England, and in the abortive negotiations with France in 1799. There is no reference to his career as Chief Justice, save in the sentence in which he says, "I was unfeignedly gratified at the appointment, and have had much reason to be so."

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[1] *Chief Justice Marshall. An Autobiographical Sketch by John Marshall*: edited by John Stokes Adams. (The University of Michigan Press, Ann Arbor: 1937.) Pp. xxiii + 48. $2.

It does not appear from Mr. Adam's introductory notes that this new material will call for the revision of Senator Beveridge's monumental biography, save on trifling points. M. S. A.

THE UNITED STATES OF AMERICA AS A POTENTIAL PARTY TO INTERNATIONAL LABOUR CONVENTIONS.

Mr. Weinfeld has written far the most illuminating discussion [1] yet published of the extent to which the United States of America will be able, within the limits set by its constitutional arrangements and traditions, to give effect to international labour Conventions. This problem dominated the discussions of the Commission on International Labour Legislation of the Peace Conference when the Constitution of the International Labour Organization was in course of negotiation, and it has to-day acquired a new practical importance as the result of the admission of the United States to the International Labour Organization in 1934. The United States has not yet ratified any international labour Convention, but a number of Conventions are now under consideration with a view to ratification, and Mr. Weinfeld's conclusions are of importance to anyone who wishes to form an estimate of the extent to which the constitutional difficulties sometimes alleged to be a bar to ratifications by the United States are insuperable.

His main conclusions, in so far as they are of special interest to readers outside the United States, may be summarized as follows:

(*a*) The Supreme Court has stated on several occasions that the treaty-making power of the United States extends to all proper subjects of negotiations between the Federal Government and the Governments of other nations, and in the light of present-day international practice labour conditions must be regarded as a proper subject of such negotiations.

(*b*) The powers reserved to the States by the Constitution of the United States are not a limitation upon the scope of the treaty-making power, as is shown by a long series of Supreme Court decisions dating back to *Ware* v. *Hylton* (3 Dall. (3 U.S.) 199 (1796)) and culminating in *Missouri* v. *Holland* (252 U.S. 416 (1920)). The Federal Government therefore has power to regulate labour conditions by treaties with foreign nations, though but for the treaty power those conditions would be within the regulatory powers of the States as matters reserved to the States.

(*c*) Although the effect of entering into a treaty regulating labour conditions is that the will of two-thirds of the Senate and of the President supersedes the will of both Houses of Congress and of the President, there is no warrant, in view of the numerous precedents the other way, for holding that the fact that Congress is authorized to legislate upon a subject removes it from the jurisdiction of the treaty-making power or prevents treaty stipulations respecting it from becoming obligatory and effective without Congressional action. "The Federal Government undoubtedly has power to enter into treaties with foreign nations regulating labour conditions in businesses which are under the legislative control of Congress."

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[1] *Labour Treaties and Labour Compacts.* By Abraham C. Weinfeld. (Bloomington, Ind.: The Principia Press.) Pp. vi + 136. $2.

(*d*) The treaty-making power *is* limited by the bill of rights embodied in the first ten Amendments to the Constitution, including the due process clause which a majority of the present [1] Supreme Court would probably hold to be a limitation on the treaty-making power in the field of labour relations.

(*e*) It would be inadvisable for the United States to ratify international labour Conventions dealing with minimum wage fixing until the Supreme Court changes its mind on the conflict between the due process clause and the fixing of minimum wages. (The court has changed its mind upon this subject since Mr. Weinfeld's book was published. *West Coast Hotel Co.* v. *Parrish*, 57 Sup. Ct. 578 (1937).)

(*f*) The due process clause is not, in view of *Bunting* v. *Oregon* (243 U.S. 426 (1917)), an obstacle in the way of ratifying treaties limiting hours of work.

(*g*) There seems to be no legal obstacle to ratification by the United States of treaties limiting or prohibiting child labour.

(*h*) Whether or not an international labour Convention will be self-executory in the United States or will require implementary legislation will depend on the terms of the Convention, but in the interest of smooth administration it would always be desirable to enact detailed statutes to give effect to ratified Conventions.

All who are interested in the future relations of the United States with the International Labour Organization are indebted to Mr. Weinfeld for his valuable study of this topical and important subject. If his analysis of the position is correct—and he writes cautiously and cites authorities in support of each of his conclusions—the United States will not be gravely embarrassed in its relations with the International Labour Organization by the constitutional restrictions which were expected at the Peace Conference to create such difficulty. In this she will be more fortunate than her northern neighbour in view of the restrictive interpretation which the Judicial Committee has seen fit to place upon the treaty-implementing powers of the Dominion. It is indeed difficult to read Mr. Weinfeld's book without entertaining more than a little surprise that in the case of *Attorney-General for Canada* v. *Attorney-General for Ontario* (No. 100 of 1936) ([1937] A.C. 327), both Counsel and the Board ignored the long series of Supreme Court decisions upon the scope of the treaty-making power in the United States. Even if it be admitted—and the point is an arguable one—that the United States decisions were not relevant in view of the ground upon which the Board decided the case, they were of some interest as a commentary upon the question whether or not the contentions of the Dominion were inherently unreasonable; and they certainly indicate that there is no reason to suppose that the Supreme Court of the United States would reach the same result as the Judicial Committee if it should ever be called upon to consider the validity of legislation giving effect to international labour Conventions in the United States.

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[1] Written in February 1937.

C. WILFRED JENKS.

JURISPRUDENCE IN TRANSITION.

THE ninth edition of *Salmond's Jurisprudence*, prepared by Mr. J. L. Parker,[1] well illustrates the transitional stage through which the study of jurisprudence in England is now passing. *Salmond* has commended itself to successive generations of law teachers and students as a lucid account of the underlying principles of English law in accordance with the Austinian theory. Though making some concessions to the Historical School, it remained down to the eighth edition the most straightforward treatise upon analytical jurisprudence in common use. So completely did it exclude anything in the nature of a philosophy of law that it has even won the attention of practitioners, if of a more inquiring turn of mind than the majority of their fellows. Writing recently of the development of analytical jurisprudence since Austin, Professor Kocourek says:

"Salmond's treatise is the most readable of all jurisprudence works in any language. It is written in an impeccable idiom, and the author made interesting some of the most forbidding aridities of legal science." [2]

It is evident, therefore, that an editor of *Salmond* undertakes a task of some magnitude. If Mr. Parker incurs criticism for his edition, it is not because the labour he has devoted to it is incommensurable with the task. It is plain, even to the casual reader, what a substantial amount of new knowledge has been packed within the covers of this edition.

Unfortunately, however, the unity of this work has now gone—visibly, because of frequent and at times exasperating breaks in the text due to additions by the editor, in brackets, and to notes, some of them lengthy, and all of them learned. In addition, there are new footnotes and appendices, so that the task of disentangling the original text shows some signs of becoming as exciting an occupation as discovering interpolations in the *Digest*. It is a matter for regret that the unfortunate habit of emending text-books by way of brackets is on the increase. Either the text should be left untouched, and alterations and additions inserted in footnotes or appendices, or the editor should boldly alter his author's text. After all, the purist can always refer to the original edition, if the question of what the author actually said appears to be

[1] *Salmond's Jurisprudence*. 9th Edition. By J. L. Parker. (London: Sweet & Maxwell.) Pp. xx. + 753. 25*s*. net.

[2] "Jurisprudence since John Austin," contributed to *A Century of Legal Progress*, vol. ii, p. 206.

important, and the more notable changes can usually be tabulated in the Preface.

These are criticisms of form, but the question of changes of substance is one to which some attention must be paid. Salmond's *Jurisprudence* was a comparatively late product of a particular School of legal thought, and as such was grasped by the undergraduate student as well as any book upon jurisprudence can ever be comprehended by him. It is at least doubtful whether the same can be said of this edition. Mr. Parker's great erudition has been devoted to the task of making the student aware of some of the more important conclusions of continental thought upon the nature of law and of the State. Suggestive as many of these additions undoubtedly are to the teacher, they are too compressed, and imply too much knowledge of their continental background to be of real utility to the student, although Mr. Parker has pointed to a gap in the English literature upon jurisprudence which is only to a small degree filled by *Modern Theories of Law.*

One final point requires brief notice. In a work of this size, with the wide range of authorities cited, some slips in references and titles are inevitable, but this edition has more than its reasonable quota. Thus, Dr. Robson's *Civilisation and the Growth of Law* appears as *Law and Civilisation,* and his *Justice and Administrative Law* as *Justice and Administration.* Continental writers appear in even less recognisable garb.

To sum up, this edition of *Salmond* leaves the reader with the impression of English jurisprudence in a process of transition, attempting to assimilate a number of ideas foreign to its traditional attitude. What is needed now is not so much a new edition of an old classic as a new work, placing the old in relation to the new. The Biblical observation about putting new wine into old bottles seems to have a special significance in the study of jurisprudence.

G. W. KEETON.

ENGLISH LAW FROM THE FOREIGN STANDPOINT.

THE foreign student of the English language often wonders after his first lesson or two why English should be thought a difficult language to learn. It is only later that he begins to despair, realising that its correct use depends not on the logical application of rules which can be learned from a textbook but on an empiric mastery of idiom and an instinctive sense for the genius of the language which can be acquired only by years of familiarity. Dr. Goldschmidt points out that the experience of the foreign student of English law is similar. " As long as he contents himself with looking for specific matters or dealing with certain modern branches of law, such as patent law or law of copyright, he considers himself at home with English law, and he even derides those who speak to him of its intricacies. But as soon as he proceeds to the examination of a question which cannot be determined without an insight into the English legal system as a whole, he will realise that a fresh study of English law is necessary. Then he will find English commentaries and textbooks difficult to understand, as they are apparently not written to explain the fundamental principles of English law to students who are trained in the spirit of a quite different legal system."

Dr. Goldschmidt in this book[1] seeks to present to the foreign lawyer and student a summary view of English law as a whole which may meet some of his peculiar difficulties. He is chiefly concerned with modern law; legal history is introduced only where it is absolutely necessary as a background to modern rules, as in the law of property. In the course of little over two hundred pages he covers an immense amount of ground—Sources, recent developments in Administrative and Economic Law, Legal Science, Classification, Equity, Public Law, Persons, Property, Contracts, Torts, Adjective Law and Private International Law. We are warned at the outset that "some parts are only touched on, while others are considered at some length. . . . It is hoped that the readers of this book will realise that its peculiar aims demand such a course."

Criminal law is omitted, and such a topic as bankruptcy, the law on which is contained in sources of a type familiar to the Continental lawyer, is dismissed in a couple of lines referring the student to a textbook. Contracts are briefly treated, because in the author's opinion the English law of contract does not, except in certain points, present striking or difficult peculiarities to the foreigner. Torts are likewise dealt with in a short chapter of seven pages, which touches briefly on only a few points of general interest and does not attempt even to enumerate the specific torts known to English law. Even where something like a general synopsis of a particular branch of the law has been attempted limitations of space have necessarily reduced this to the barest outline. Points of practical importance have had to be omitted and rules have had to be stated in general terms without the qualifications and exceptions to which they are subject. But Dr. Goldschmidt makes it clear that his object is only to provide an introduction, a starting-point from which the foreigner may proceed to the study of native legal literature. In this, so far as an English teacher can judge, he would appear to have succeeded admirably. His summary exposition of rules of English law, so far as we have tested it, seems, subject to the qualifications made above, to be extraordinarily accurate. There are few points on which we can raise a query. On p. 52 he says that the distinction between *Yaffe's Case* and *Institute of Patent Agents* v. *Lockwood* turns on the point that in the former case the scheme in question was not to be submitted to Parliament before coming into effect; but Lord Dunedin expressly said that this distinction, obvious as it was, would not avail. The statement on p. 101 that "the bulk of landed property in England is settled in this way" might mislead a reader into thinking that the numerous householders who in the language of the advertisements " own their own home " and the other small " investors in freehold property " hold their interests under marriage settlements; what is meant is rather that practically all large or old family estates are settled. The description of the working of a settlement from which this sentence is taken occurs in the passage explaining the part played in actual life by the device of the trust, and perhaps it might be further remarked that the connection between settlement and trust is not made very clear by the statement that " Trusts are included in the settlements made in the event of a marriage." The statement on p. 169 that " English jurisprudence still regards corporations as *personæ fictæ* is perhaps too sweeping; Dr. Goldschmidt confines his attention to the creation and the contractual powers of corporations and neglects the somewhat anomalous rules concerning their liability in tort. And a consideration of the rules of contingent remainders or of the instances given by Professor Pound at pp. 119–24 of his *Interpretations of Legal History* would have shown that English law has not always had such a horror of *Begriffsjurisprudenz* as Dr. Goldschmidt imagines.

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[1] *English Law from the Foreign Standpoint.* By Hans W. Goldschmidt, Dr. Jur., Dr. Sc. Pol., formerly Professor in the University of Cologne. (London: Sir Isaac Pitman & Sons, Ltd., 1937.) Pp. xviii + 258. 21s. net.

These points are, however, of small importance compared with the substantial merits of Dr. Goldschmidt's presentation, just as a few awkward turns of phrase or an occasional Teutonicism (" We are passing now to a survey of the present state of things " for " We now pass ") or Gallicism (" pose a question ") do not seriously detract from his remarkable power of expressing himself in plain and correct English. His knowledge of textbooks, articles in periodicals and cases is extensive and thorough; he has a gift of simple and lucid exposition and a wonderful eye for a significant and illuminating quotation. And he has enhanced the value of his work for those for whom it is in the first place designed by frequent references to textbooks in which they can pursue further study, and for all readers by providing an excellent index.

But if this were all it would hardly be enough to recommend his work to the particular attention of English readers. There is, however, much more. Comparative lawyers will find this book of great value because of its frequent references to foreign systems. These references often expand into something more than a mere note of actual rules of law. We may instance the disquisitions on the meaning of administrative law (pp. 62–5), on specific performance (p. 118) and the remedies which in other systems take the place of the English injunction (pp. 123–5), on the administration of assets (pp. 127–8), on domicile (pp. 155–6), on the protection of the buyer in good faith (p. 189) and the valuable pages (pp. 142–53) in which the general arrangement of private law is discussed.

Even more interesting are the passages in which the author allows himself to express a personal opinion on the value of English institutions or to comment on recent developments. He concludes, after careful study of all the arguments that have been brought forward in recent controversies, that on the whole English case law succeeds in combining certainty and flexibility. " Certainty is not equivalent to rigidity, but depends, as has been shown, on the possibility of foretelling the probable issue of proceedings. Flexibility, on the other hand, plays a part only in the relatively few cases in which a development of the law seems desirable. When such a flexibility is taken into account, there is no ground to contest that in most cases the probable issue could be foretold." English lawyers have lately begun to realise that they have tended in the past to underestimate the importance attached to precedent in Continental systems, but the information furnished by Dr. Goldschmidt on Spanish and German law, which strongly reinforces this later view, will probably be new to many. Dr. Goldschmidt also finds congenial the classic exposition of the Rule of Law. " It may be that the different aspects of the rule, as stated by Dicey, can be questioned and that numerous logical arguments can be put forward against them. But as a general principle the rule of law can scarcely be refuted by logical attacks. The essence of the rule consists in the enunciation of fundamental English principles, i.e. of the supremacy of the law as opposed to any arbitrary power and of the equal subjection of all classes to the ordinary Law Courts. These principles have been evolved in the course of a long history, they are far from being meaningless, and are deeply rooted in the hearts of the English people. In the opinion of a foreigner these principles are so significant to an Englishman that he cannot conceive their being dropped." But he is impressed by the growth of what he calls the " Strong State." This development of administrative control, albeit within the framework of the law, together with the political, social and economic changes of recent years, necessarily reflected in legislation, leads him to the conclusion that English law is standing on the threshold of a new era and that a great responsibility rests on the contemporary generation of English lawyers. " Whereas lawyers used to have the privilege of conforming slowly to new social demands, they are now obliged to keep pace with rapid social development. For its efficiency depends greatly on their skill in devising new legal conceptions or in remodelling existing notions to satisfy modern social phenomena. The more the lawyer is equal to his task, the greater will be the possibility of leading the new social stream along the channels of tranquil evolution." He considers it fortunate that, as Professor Goodhart has pointed out, a new spirit admirably adapted to serve this end seems to be making its way into English legal studies, a spirit which is not content with a purely practical exposition of legal rules but aims at a scientific comprehension of the law. The increasing number of systematic textbooks which venture sometimes not only to arrange but even to criticize the actual law and the growing respect which practitioners pay to academic writings are welcome signs of this. Dr. Goldschmidt considers that the English jurisprudence of the future will continue its traditional task of analysing and systematizing the rules and concepts of English law. But he ventures the opinion that, although the indications are few at present, English writers will also fashion a sociological method, explaining and criticizing the rules which they expound and analyse by setting them against their social background.

Not only the foreign student and the comparative lawyer but every thoughtful English lawyer should find matter for reflection in these opinions of a learned and acute observer of our system.

A. H. CAMPBELL.

GERMAN NATIONALS ABROAD.

"THE legal position of German nationals abroad" has of late become a major problem of international practice. The number of Germans who, in the course of the last five years, were compelled to find, or at least to seek, a new abode is very substantial. To advise them on the preparation and the consequences of their emigration and immigration involves numerous questions connected not only with the liquidation of their existing and the arrangement of their future interests in Germany, but also with their settlement in the new country, the selection of which must frequently be preceded by a review of the factual and legal situation in more than one other country.

Though the title of their book does not indicate it, it is this situation to the comprehensive treatment of which the authors' labours were directed.[1] On the other hand, they have not confined themselves, as the title does suggest, to an exposition of the pertinent rules of non-German laws, but they have included the whole network of German laws which surrounds the emigrant before and after he leaves Germany. They thus deal with private international law (under the heading of which they also describe very substantial parts of municipal law), with the law relating to financial and investment matters, the law relating to aliens, tax law, the law relating to foreign exchange restrictions, the law of nationality, the law concerning passports, permits and residence and the law of extradition, and they describe all these matters as reflected in the law of Germany, Switzerland, Austria, Czechoslovakia, France, Belgium, Italy, Holland and England.

It is a very wide field indeed which the authors have, one may add, successfully, undertaken to cover. It is evident that they were assisted by a great practical experience, and the numerous examples of individual problems and solutions which accompany many parts of their work will be found to be particularly instructive. They did not intend writing a theoretical and scientific treatise, but a companion for practitioners, and the perhaps somewhat limited number of lawyers whom the authors thus address will no doubt derive great assistance from their onerous studies.

The intention to abstain from theory has perhaps been carried a little too far inasmuch as the authors have omitted practically all references to what they call the "scientific apparatus." Though they believe that the inclusion of references to authorities would have led to considerable complications from which the lucidity would have suffered, it may be doubted whether many readers will share this opinion. The somewhat cursory character of various statements, which in view of the abundance of problems was inevitable, would have been compensated by references to the basic material which, as the authors themselves indicate, will often have to be examined if more detailed information is required.

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[1] *Die Rechtslage deutscher Staatsangehöriger im Ausland.* By Dr. H. Emmerich and John Rothschild. (Haarlem-Holland: H. D. Tjeenk Willink & Zoon N. V.) Pp. 356, fl. 5.50.

It is in no sense a disparagement of the reliability of the authors' work to state that here and there the desire and also the necessity for pressing so vast a material into what is after all only a nutshell has resulted in statements which are not entirely accurate. Thus the statements that, according to the view generally prevailing in England, the law of the domicile applies to the promise to marry (p. 73), or that in England a wife can divorce her husband by reason of his "adultery, heavy punishment and serious moral misdeeds, e.g. rape" (p. 103), or that a minimum of seven persons is required to form a limited company in England (p. 136) surely call for amendment.

F. A. MANN.

FOREIGN LAWS OF MARRIAGE AND DIVORCE.

MR. COHEN has with exemplary industry collected and put into English the laws upon marriage and divorce of every European country, excepting those not Continental, such as Great Britain, Irish Free State, Malta.[1] In a second volume he hopes to perform the same service for non-European countries, and in a third to attempt a collection of the religious laws on the subject. This admirable effort is intended, as we are told in the preface, to meet the needs of lawyers in countries such as Palestine, in which the personal status of foreigners is governed by their national law, and there are many resident foreigners. Speaking from experience, the reviewer would surmise that most of the matrimonial difficulties in Palestine arise from conflicts of religious rather than of national law. The third volume of Mr. Cohen's work should therefore be of special value. Nevertheless the present volume may well prove useful. Moreover, it is clearly and elegantly printed and a credit to Tell Aviv typography.

Mr. Cohen has not limited his statement of the law to celebration and dissolution of marriage. He treats also of the recognition of foreign marriages, of matrimonial property, of the effect of marriage on nationality and the like. We trust the reception of the present volume will encourage the author to proceed to the completion of the work.

F. M. G.

THE CIVIL LAW OF PALESTINE AND TRANSJORDAN.[2]

THE first volume of this work was reviewed in this *Journal* in November 1933.[3] It contained, as will be recalled, an English translation of the

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[1] *The Foreign Laws of Marriage and Divorce. Part I: Countries of the European Continent.* Compiled by Herman Cohen. (Tell Aviv.: Palestine Publishing Co., 1937.) Pp. 263. 18*s*.

[2] Vol. ii. By C. A. Hooper. (Jerusalem, 1936.) Pp. 197.

[3] Vol. xv, pt. iv, pp. 281 ff.

Mejelle from the Turkish text. The second volume, it was then announced, would contain an English commentary on the Mejelle. This new volume does not, however, quite fulfil the expectations thus created. It contains, indeed, an exposition of the Moslem law of Contract with special reference to the Mejelle and citation of cases decided in the Turkish Court of Cassation and in the Palestine courts. But, as we are told in the Preface, the author thought it desirable to consider in some detail the provisions of the Palestine Order in Council, 1922, relating to the application of English and Ottoman law in Palestine before proceeding to comment upon the articles of the Ottoman Civil Code itself. The discussion of these provisions takes up a considerable part of this volume, and it appears from the text that a third volume is to be anticipated. We trust that the complete commentary on the Mejelle in English is only postponed and not abandoned. Few if any Englishmen save Mr. Hooper possess at once the linguistic and legal knowledge requisite for its compilation.

In dealing with the Order in Council, Mr. Hooper shows his accustomed industry and has collected numerous decisions both of the Cypriot and Palestinian courts which have a bearing upon the interpretation of the relevant articles. A useful appendix gives a list of the Ottoman laws repealed or superseded in Palestine. To this some more recent additions may be made. Thus by the effect of Art. 2 of the Criminal Code Ordinance, 1936, now operative, the Ottoman Penal Code has ceased to be in force in Palestine. Again, of the two articles of the Ottoman Code of Criminal Procedure conferring extraterritorial jurisdiction upon the Criminal Courts, namely Arts. 5 and 7, only the former now remains, Art. 7 having been repealed by the Schedule to the 1936 Ordinance. It is, perhaps, somewhat surprising that Art. 5 should have been permitted to survive. It gives to the courts of Palestine jurisdiction to try there any citizen of Palestine who when outside the territory of Palestine has committed a crime against its safety or has forged Government documents or bank notes authorized by the Palestine Government.

Perusal of Mr. Hooper's careful and admirable book is saddened by the reflection that so much of it seems destined in no long time to become useless. As to the political advantages derivable from the division of Palestine into three parts, we offer here no opinion. But the multiplication of authorities consequent upon Partition cannot fail to upset and discredit the body of enacted and of case law which has been created in Palestine since the war and to render vain much of the recent legal writings in English, Arabic and Hebrew upon the existing Palestinian Corpus Juris.

F. M. G.

REAL AND PERSONAL STATUTES IN EGYPT.

The problem to which M. Boghdadi addresses himself[1] is one of importance and interest in Egypt, and is related to similar problems in other former Ottoman territories. In those countries the application of law and even the jurisdiction of the courts have depended in the past and still to some extent do depend on national and religious affiliation to a degree unknown in Western lands. In Egypt the texts upon which respective jurisdictions of the Mixed, Native and Religious courts rest tend to assimilate the criteria by which these limits are determined to the time-honoured form of Real and Personal Statutes. The use of these terms has, in this connexion, become traditional in Egypt, but, historically the circumstances which gave rise to the theory of the statutes differ considerably from those which in Egypt gave special jurisdiction to Mixed, Consular and Ecclesiastical courts. M. Boghdadi examines the origin of these jurisdictions and seeks to show that all save the Moslem courts should in principle be treated as *tribunals d'exception.* In his view, and there is much to be said in its favour, the Moslem law of the Hanefite rite is the common law of Egypt, applicable in general to all persons and transactions save so far as it can be shown to be excluded by an express text.

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[1] *Origine et Technique de la Distinction des Statuts Personnel et Réel en Egypte.* By Hassan A. Boghdadi. (Cairo, 1937.) Pp. 396.

The later chapters of M. Boghdadi's work are of greater interest than the earlier. His lengthy discussion of the nature of the distinction between the real and personal statute in European law throws little light on Egyptian problems, and we are convinced that he is in error in attributing serious importance to the influence of the Italian Code in moulding the Egyptian rules in this matter. The jurisdiction attributed to the Mixed, Consular and Religious courts in Egypt would have been the same whatever views Italian law had promoted as to the scope of the national law. Historical and not academic influences were dominant in this connexion in the negotiations out of which the Reorganization Decrees emerged.

The later chapters contain a valuable discussion and criticism of the trend of the more recent cases in the Mixed and Native Courts touching upon the matter in issue. Here again we should be inclined to attribute the increasing scope allowed to Moslem law less to academic than to social reasons. Years ago Moslem law, as also English law, was unduly neglected by those living outside its immediate influence, in part because of its form, in part because it was associated in the minds of many with an antipathetic social and political system. This attitude is changing, and serious study by scholars with a scientific training is likely to prove very profitable. Yet, whatever transpires, we respectfully enter a caveat against the Moslem law of inheritance as applied in particular to land. It may be regarded as a happy chance that in most Arab lands—Palestine, Syria, Iraq—the peculiarities of the Ottoman law have secured an alternative law of inheritance of a simpler and more modern character.

F. M. G.

RENVOI.

No problem of Private International Law has been more discussed than that of Renvoi, and a critical examination of the English decisions on the subject by a leading Continental jurist is, therefore, of the greatest value.

But this short treatise [1] is welcome for another reason, for its publication commemorates the services of the late Professor Mendelssohn-Bartholdy to Public and Private International Law, and is the outcome of Oxford's desire to pay tribute to the memory of an adopted, but much-loved son.

In a short preface Dr. Cheshire, who undertook the delicate task of editing the manuscript, speaks of the author's wide and accurate knowledge of contemporary European law, and his readiness at all times to place it at the service of his colleagues. Dr. Magdalene Schoch of Hamburg University describes the range of Mendelssohn-Bartholdy's legal interests, and of his passion for justice, while Mr. P. V. M. Benecke gives us a more intimate personal appreciation of him.

The English decisions which concern the application of foreign law have generally been regarded as establishing the principle that when, by virtue of an English rule of Private International Law, a matter should be referred to the law of another country, the reference is to the whole of the law of that country, so that the object of the English court should be to decide the case in the same way as it would be decided if it were adjudicated in the foreign country. It is in this general sense that the English courts are said to have adopted the doctrine of renvoi.

The author's object was to ascertain, by means of an exhaustive analysis of the decisions on the subject, the extent to which the English courts have in fact acted upon this view, for, as he aptly states (at p. 4), " appearances are sometimes deceptive even when precedents are handled as carefully as they generally are in an English court of law."

Contrary to Dicey's conclusion that " the authorities are strong to show that the English courts have generally, if not invariably, meant by the law of a foreign country the whole of the law of that country " (see *Conflict of Laws* : Appendix ; Note 1), Mendelssohn-Bartholdy was of the opinion that the English decisions taken together negative the doctrine which applies foreign Private International Law in every case which is governed by a foreign law. He maintained that, with the exception of *In re Ross*, [1930] 1 Ch. 377, in all recent cases the English courts have consistently "applied directly the substantial municipal law of the foreign country," and he considered that the uniform course of reasoning evinced by these decisions is inconsistent with the adoption of the general doctrine of renvoi, and the main argument of *In re Ross*. It is interesting to find that Mr. J. H. C. Morris, an Oxford colleague of the late author, has arrived at the same conclusion, and likewise contends that *In re Ross* is the only clear-cut decision which squarely rejects that simple solution. (See *British Year Book of International Law*, 1937 ; 32.)

It is not possible within the compass of this review to enter upon a detailed discussion of the validity of this conclusion, but the principle enunciated by Sir William Scott in *Dalrymple* v. *Dalrymple* (1811) 2 Hagg.

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[1] *Renvoi in Modern English Law.* By the late Albrecht Mendelssohn-Bartholdy, LL.D. Edited by G. C. Cheshire, D.C.L. (London : Humphrey Milford, Oxford University Press, 1937.) Pp. xii + 87. 5*s*.

Cons., 54, 58; that where by a rule of English law a matter must be referred to a foreign law, " the law of England withdraws altogether and leaves the legal question to the exclusive judgment" of that law, has been so frequently proclaimed, that it is difficult to resist the conclusion that it is at present an established doctrine of English Private International Law, that a question which is referred to the law of a foreign country should be decided in England as it would be decided in that country. The fact that it has generally happened that the English courts have in the end applied the internal foreign law, or that an individual judge would have preferred a more direct method of reaching the same result, would not seem to involve the negation of the principle upon which they have professed to act. In any case, the doctrine is still open to review by the appellate courts, and this minute critical examination of the English decisions by a distinguished comparative lawyer cannot fail to be a valuable contribution towards the solution of one of the most controversial and bewildering problems in the whole field of Private International Law.

D. J. LL. D.

GREEK PRIVATE INTERNATIONAL LAW.

It is of special interest that the science of Private International law should be enriched by the work of Mr. George Streit, late professor of Private International law at Athens, Member of the Academy of Athens, Member of the Institut de Droit international, etc. Over thirty years ago he published the first volume of his system on " Private International Law." Four other volumes were to follow. Other activities hampered the continuation of his work, and both legal and scientific circles have long regretted that it stopped at a first volume which obtained a great and well-deserved success; in fact, an authoritative treatment of Greek Private International law, in a comprehensively systematic form, has been long needed by the scientist, the judge and the practitioner called upon to deal, in the course of their activities, with the problems raised by the conflict of laws. By the side of Mr. Streit appears the name of Mr. Peter Vallindas, whose knowledge of and specialization in the subject made of him, according to Mr. Streit's own testimony, an invaluable collaborator.

The book[1] is now published in two large volumes; the first contains the general part and the second is devoted to the special part.

In the general part are expounded the theories of the nature of Private International law, its historical evolution up to the nineteenth century and its dogmatic evolution thereafter, with special reference to such writers as Foelix, Rocco, Burge, Story, Wächter, Savigny, Mancini, Zitelman, Pillet, Frankenstein, who represent with many others either the classical thought or new tendencies or theories of construction. We notice that the authors regard the division of the rules of law into international and municipal as preferable to any other, even to that of public

[1] *Ιδιωτικοὶ Διεθνὲς Δίκαιον*. By George Streit and Peter Vallindas. (Athens, 1937.) 2 vols. Pp. 400 and 573.

and private law, which latter is considered as being a subdivision of internal law.

In treating of the historical evolution of Private International law the authors give us a most interesting study not only of the evolution itself but also of the distinction between the history of this science and that of norms; their treatment throws much light in particular on the development of law in Greece. The authors observe that if its growth has been incomplete, this was due not only to the existence of many cities and the composition of the courts but, perhaps, also to the particular intellectual characteristics of the Greeks and their conception of law.

A happy feature of the work is the bibliography, more especially the Greek one; it is most helpful to those who desire to consult it.

Regarding the sources, the writers consider codification as a necessity owing to the insufficiency of the sources themselves; science and jurisprudence do not constitute sources by themselves, though, undoubtedly, both separately or combined, they may offer elements creative of custom. In this connexion the writers make a comprehensive study of various attempts at and methods of codification by means of Conventions, conferences and writings both in Europe and in America.

The sources of Greek Private International law are fully expounded. It is to be noted that up to 1856, with few exceptions, Greece lacked legislative provisions, more particularly in Private International law; *locus regit actum* was almost the only rule which obtained in testamentary matters. The present draft civil code consecrates, it is noted, a whole chapter to Private International law.

The chapters that follow treat of all matters concerning foreign law and its application. It is a happy idea to have added, at the end of the first volume, a summary but very adequate analysis of the Capitulations Convention of Montreux, May 8, 1937.

The second volume enters into the details of natural persons, their nationality, domicil, capacity, absence, emancipation; the legal status of aliens in Greece, which in principle is equal to that of nationals; juridical persons such as companies. The rule *locus regit actum*, and matters referable to the *lex causae, lex loci actus, lex loci solutionis, lex rei sitae* prescription, are, with cognate questions, fully developed.

The law of Obligations is adequately treated; the opinions of the writers are clearly expounded in a manner likely to attract the lawyer's attention.

The Family law constitutes one of the most instructive parts of the volume and takes, naturally, a large place in it. We find therein all that concerns most delicate matters which often present, both to practitioners and judges, difficult problems for solution; in an authoritative manner the writers guide us through all these intricacies, methodically, clearly and scientifically.

As a whole the work constitutes a great contribution to the science of Private International law; and in addressing to the writers our fullest appreciation we venture to express the hope that in the interest of the scientist, the practitioner and the judge this work will be translated into a language of Western Europe so that others interested may share its benefits.

M. C.

THE RUSSIAN CORPUS JURIS.

THE author[1] deals with the greatest event in Russian legal history before the Bolshevist Revolution—the compilation of the Svod Zakonov, the Russian Corpus Juris, a publication originally of fifteen, later on of sixteen volumes, each of which had its further subdivisions. Each volume or part of a volume dealt more or less exhaustively with some particular branch of the law.

The Svod Zakonov was a secondary, and not a primary, legislative product. Its first edition, the work of a Commission under the chairmanship of Count Speransky, the statesman of the reigns of Alexander I and Nicolas I, appeared in 1832, and the official contention was that it did not contain anything new, but was a mere systematized restatement of the law as it already existed in the numerous Acts which had accumulated for the past centuries. The promulgation of the Svod Zakonov was preceded by the publication (for the first time in Russian history) of a Complete Collection of Laws (the First Complete Collection of Laws, as it came to be called later on), containing, in chronological order, all the Acts of the past centuries, beginning with the reign of the Moscow Grand Duke Alexei Mikhailovitch (1645–78). Every section in the Svod Zakonov was accompanied by references to the Acts in the Complete Collection of Laws on which it allegedly was based. The promulgation of a Svod (" Svod " etymologically means a summary, a digest ; " Zakon " means law, or a law), purporting faithfully to reproduce the existing law, was the result of a fierce political struggle, in which the supporters of the opposing idea of new codes, on the pattern of the Napoleon Codes, were badly beaten.

In later years, the contention that the Svod was purely Russian, without any foreign admixtures, became one of the arguments of the Russian Conservatives against any considerable changes in the law, in particular against a new civil code, which, in the circumstances, could not fail to follow foreign precedents. In reply, the supporters of legal reform challenged both the national purity of the Complete Collection of Laws and, especially, the contention that the Svod was a mere restatement of the Complete Collection. According to them, what happened was that Speransky, originally himself the main protagonist of new codes, later on, broken by his disgrace in 1812 for his supposed French sympathies, declared himself converted to the idea of a Svod, because he had realized that, in the circumstances, to insist on new codes would mean, besides endangering his own position and even safety, to postpone indefinitely a codification of the law, of which the country was badly in need. But in fact the compilation of anything like a coherent and self-sufficient legal monument exclusively out of the casual and contradictory Acts of the Complete Collection was a sheer impossibility, and he filled up the many gaps by borrowing from foreign sources.

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[1] *Sur les origines étrangères de la plupart des lois civiles russes,* by Léon Baratz. (Paris : Rousseau & Cie.) Pp. 59. Frs. 10.

In the book under review the author with great skill and learning relates the main arguments of both parties to the controversy, and with filial devotion indicates the contribution made to it by his father, H. Baratz, who was the first, or one of the first, to notice that many of the sections of the Svod, in particular, of Volume X, Part I of it (the part which contained Civil Law) were not based on the Acts given in the references, but could be traced to various foreign sources, legislative and literary.

S. DOBRIN.

WAR AND NEUTRALITY.

THE issue of a case-book in two volumes, one devoted to the law of peace and the second to war and neutrality,[1] must, at the present day, be regarded as somewhat unfortunate. Yet it is in this form that "Pitt Cobbett" has always been known and recommended to students of international law, and the editor of the fifth edition could hardly be expected to make such a radical alteration as that of producing two volumes in one. But the result is that a good many cases are reproduced here which in one volume would be doomed to obscurity. It is difficult, for instance, to see what value cases on intercourse with the enemy can have, as this is pre-eminently a question dealt with by executive decree. They belong rather to case-books on the law of contract. The cases relating to capture and visit and search must, in view of modern developments in warfare at sea, be accepted with reserve. The "making of the Peace of Portsmouth, 1905" is not likely to inspire interest, and to say the least is a somewhat anomalous heading in a modern case-book. Postliminium, in view of the legal abolition of conquest, hardly deserves more than a footnote. It is possible that Nurse Cavell's case is better left out of legal discussion altogether, and its reproduction here is a matter for regret. The learned editor's criticism of the decision in the *Leonora* is interesting and impressive, but the other view might perhaps have been more clearly emphasized. There are surprising omissions in this edition. We look in vain, even in a note, for references to *Karnuth* v. *U.S.* (1929) or to the *Bathori* (1934), and the absence at p. 64 of any reference to the Privy Council's observations on the sources of international law in *In re Piracy Jure Gentium* (1934) gives a false impression of the latest English doctrine on this subject. Other recent cases such as the *Administrator of German Property* v. *Knoop* and *Holland* v. *Administrator of German Property* might perhaps have received some mention. Yet Mr. Walker has discharged a task of extreme difficulty with learning and patience, and the vast amount of material he was asked to revise made it impossible to bring such a work up to date without writing an entirely new book. This, indeed, is what we are left wishing for. J. MERVYN JONES.

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[1] *Cases on International Law.* Vol. II—War and Neutrality. By Pitt Cobbett. Fifth Edition by Wyndham Legh Walker, M.A., LL.B., of Gray's Inn, Barrister-at-Law. (London: Sweet & Maxwell, Ltd.) Pp. xxxix + 598. 25*s*. net.

NATIONALITY OF A MERCHANT VESSEL.

THE important question of the tests governing the determination of the nationality of a merchant vessel calls for an exhaustive research into the maritime codes of the leading States, and the author has performed this task with admirable accuracy and clearness.[1] An examination of the practice of the various countries shows, on the one hand, that States recognize each other's right to restrict, as suits their purpose, the admission of vessels into their respective merchant marines, and that, on the other hand, there is no universal criterion as to the conditions required by each particular State as evidence of nationality. Several States do, in fact, recognize as entitled to national registration vessels of foreign build, carrying foreign crews and owned by foreigners. But there is almost complete unanimity on the doctrine that a vessel, once duly registered in a country, forms part of its territory " for, just as in its own territory, that State exercises authority upon the vessel and no other State may do so " (Judgment of the Permanent Court of International Justice in the case of the *Lotus*). In time of war, however, nationality must be clearly distinguished from national character. As the author rightly points out, it is the " real character " of the ship which a prize court takes into account, and this character may well differ from the nationality impressed upon her by the flag she is flying.

Mr. Rienow has written a book which will, no doubt, constitute a standard treatise on the subject, as it supplies useful and reliable information on the naval codes and practice of all the important maritime States.

C. JOHN COLOMBOS.

PEACEFUL CHANGE.

THIS little book[2] is described as a symposium, and contains eight lectures delivered at the London School of Economics by members of the staff. The lectures have been published in the form in which they were delivered, and not rewritten as chapters of a treatise. There is not, then, a unity of design about the treatment, still less about the views expressed. But the book is none the less a helpful contribution to the study of the outstanding problem of our time—how to bring about a peaceful change in the international order, and so avert the fall of the sword of Damocles. The first two essays by Professors Webster and Toynbee give the historical background ; there follow two studies of the economic problem by

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[1] *The Test of the Nationality of a Merchant Vessel.* By Robert Rienow. (London : Humphrey Milford, Oxford University Press.) Pp. 247. 14*s.* net.

[2] *Peaceful Change : An International Problem.* Edited by C. A. W. Manning. (London : Macmillan & Co., 1937.) Pp. viii + 193. 5*s.*

Professors Robbins and Gregory; then an admirable study by Miss Lucy Mair on Colonial policy, and a learned and suggestive contribution by an academic exile from Germany, Dr. Karl Mannheim, on the psychological aspect. The last two lectures are on the legal aspect, by Dr. Lauterpacht, and some tentative conclusions by the Editor, Professor Manning.

Several of the lecturers suggest solutions; but unfortunately there can be no confidence that the proposals have relation to the actual state of affairs. It is not difficult to propound a solution of an international legislature if you accept the premise of a world State. It is attractive, again, to consider a psychological solution, by teaching which will correct the aggressive passions of certain nations. But the problem which is not solved in the one case is how to obtain a surrender of the idea of national sovereignty, in the other how to persuade the all-powerful party in the totalitarian States to admit a teaching which will temper their tyranny over opinion.

Dr. Lauterpacht is thorough in his requirements for a peaceful change. There must be a process of a peaceful alteration of the law for which the consent of the State affected is not required. "International legislation means an international legislature. And an international legislature is a world-State. If that word in its implications has sufficient deterrent power to cause us to reject the solution involved in peaceful change as an organic, effective institution of international law, then that must be the end of the matter. We ought in that case to restrain our eloquence about peaceful change." He does admit in the end that it is possible that his conditions are not realizable, and that the obstacles in the way of peaceful change are insurmountable. Professor Manning is a rather pessimistic "compère." He is sceptical even about a world public opinion or "the conscience of mankind." The "steel framework of law and order" seems far from realization. He hopes that the preponderance of prospective opposition to lawless violence may induce expansionism to proceed by constitutional paths. But his conclusion is that the problem has yet to be fitted with a key.

The reader must not, then, expect to find a ready solution of the problems of the world in these studies of learned professors. But he will find a lucid statement, varied points of view based on wide knowledge soberly expressed, and suggestive recommendations.

The International Studies Conference also considered this year the subject of peaceful change; and in preparation for its meeting groups in many countries were engaged on special studies of different aspects of that large question. This book[1] is written by the head of the Archives Department in the Swedish Foreign Office, and is a learned and thorough discussion of the basis of international law on the one hand and the possibilities of change in international legal situations on the other. It cannot be said to break new ground or to offer any fresh hope to distracted jurists and statesmen. The author sets out carefully and accurately, and with citations from the literature of international law in four languages, the origin and the method of change in the rules of international law. That part, however, has little relevance to the problem of peaceful change ; and the writer stresses the anomaly that the application of international law in practice can be frustrated, because a State cannot be required to submit an international dispute to a tribunal deciding on a legal basis.

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[1] *International Legislation.* An Essay on Changes in International Law and in International Legal Situations. By Torsten Gihl. (London: Humphrey Milford, Oxford University Press, 1937.) Pp. vii + 158. 10s. 6*d.*

In his analysis of the more original part of the subject, the changes in international situations, the Swedish writer comes to much the same conclusion as Professor Lauterpacht. If there is to be peaceful legal change, there must be an international organ with authority to carry out changes against the will of States. He shares, too, with Professor Manning scepticism about the fulfilment of that condition. So he sees no way out of the dilemma. On the one hand, if we get peace we get no changes ; on the other hand, the establishment of a super-State authority with power to change existing legal situations would mean a radical alteration in the organization of the community of nations ; and no prospect of its realization is discernible. The only hopeful suggestion that he can make is the settlement of international disputes by a tribunal deciding *ex æquo et bono* ; and States are little inclined to agree to that method save in certain particular cases. He ends, indeed, on a general reflection that both States and international law exist for the sake of human beings ; and, from the point of view of human beings, the assertion of the interests of a particular State may not be more important than the maintenance of international law. If that were realized, it would be more possible to adjust State interests by means of voluntary concession. Unfortunately, there is no sign of any progress towards the recognition of the claims of humanity.

The book has been translated from the Swedish by Mr. Sidney Charlston, who has done his work adequately, although there is no disguising that it is a translation. NORMAN BENTWICH.

THE INTERNATIONAL LAW OF TAXATION.

MANY transactions extending over several countries involve the crucial question whether double taxation attaches to them. The desire of the parties to choose the most favourable solution is as legitimate in the conflict of tax laws as it is in the domestic sphere of taxation. The legal adviser, however, is frequently at a loss to indicate the solution because access to the foreign revenue laws is difficult. The admirable " Collection of International Agreements and Internal Legal Provisions for the Prevention of Double Taxation and Fiscal Evasion," which is being published by the League of Nations (6 vols., 1928–36), is necessarily limited to the reproduction of the international arrangements and to short references to the domestic legislation designed to avoid double taxation, but cannot describe these measures in the environment of the general system of taxation prevailing in the respective countries. Here the encyclopædia [1] which is being edited by Dr. Rosendorff and Dr. Henggeler offers welcome assistance. At present, Part I (3 vols.) is published. It may perhaps be too early to form a definite view on the work before Part II is available. The preliminary impression is that, if the volumes that are to come compare with those already published, the editors will have achieved their ambitious aim of presenting a complete and accurate account of the different municipal laws and international agreements on governmental taxation throughout the world.

The planning of the work deserves praise. Part I is devoted to the different countries of Europe, whilst Part II is intended to deal with the non-European countries. Part I consists of 33 national sections and an Annexe containing a collection of international agreements for the avoidance of double taxation. The national sections include, *inter alia*, Great Britain and Northern Ireland, the Irish Free State, France, Germany, Italy, Soviet Russia, Holland, Belgium and Switzerland. Each section is contributed by eminent experts from the country in question. Among them are many distinguished administrative lawyers serving in the Revenue Department of their respective countries. The section on Great Britain and Northern Ireland is written by Mr. P. Suggett, H.M. Principal Inspector of Taxes, Inland Revenue Department, and that on the Irish Free State is written by Mr. R. P. Rice, Principal Officer, Department of the Revenue Commissioners. These two sections are published in English, the Italian contribution is written in the Italian language, the articles on France, Belgium, Luxembourg, Monaco, Portugal, Roumania, Spain and Turkey are in French and the rest of Part I is published in German. The individual contributions naturally vary in quality and length. The section on Germany is very detailed ; the section on Great Britain is a well-arranged survey of the *Geldart* type of the present system of income tax and death duties, with special reference to the arrangements for the avoidance of double taxation made by this country and the liability to United Kingdom tax of Dominion and foreign Governments and their respective representatives ; the article on Soviet Russia is a brilliantly written survey of conditions in a new social community which, however, in the province of taxation does not appear to vary essentially from the brave "old" world.

The national sections exhibit several common features which indicate the co-ordinating influence of the editors. All contributions give a concise account of the municipal system of governmental taxation, pay special regard to the conflictual aspect of the law of taxation and refer to the international agreements relating to double taxation and tax evasion to which the country in question is a party. The Annexe is of particular interest. It represents a collection of 98 conventions for the avoidance of double taxation which are either of a general character (as those modelled on the bilateral draft conventions suggested by the League of Nations) or of limited application (as those made by Great Britain with various foreign states on shipping, air transport, commercial agencies, etc.). The volumes are bound in loose-leaf form, and it is announced that supplements will be issued in order to keep the work up to date. The loose-leaf form would permit of the addition of bibliographies to the national sections, which would enhance the practical usefulness of the work. At present only a short bibliography on problems of double taxation is provided (Vol. I, p. xxv).

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[1] *Das Internationale Steuerrecht des Erdballs nebst sämtlichen Abkommen zur Vermeidung der Doppelbesteuerung.* By Dr. R. Rosendorff and Dr. J. Henggeler. Zürich und Leipzig, Verlag für Recht und Gesellschaft A.G., Part I, 1936–7, 3 vols. ; pp. 2059.

Although the encyclopædia is primarily designed to serve as a reference book for practitioners, it is also valuable for legal research. It is a store of information for the student of comparative law in a matter which is bound to attract increasing attention in the future. It is evident from the late Sir Basil P. Blackett's observations on the effect of double taxation upon foreign investments (League of Nations Publ., E.F.S. 16 (A.16), 1921) and from other League publications that double taxation is no less an obstacle to international trade than the strife for economic self-sufficiency or the disorganization of international credit. Whilst it is beyond the reach of the law to overcome economic obstacles, the conflict of tax laws, being a technical legal problem, admits of mitigation and perhaps, at some future date, even of complete solution by the international co-operation of the lawyers. To prepare the way to that complete solution is a field for the application of the science of comparative law. M. SCHMITTHOFF.

GOLD CLAUSE CASES.[1]

GOLD clauses and other clauses protecting against monetary depreciation have been of great importance in loan cases these last years, particularly in those relating to the American Gold Clause Act of 1933. This is a matter where comparative law can be most usefully applied, seeing that the situations which arise out of the loan issues on post-war money markets are similar in character.

Lord Russell of Killowen said very wisely, in the *International Trustee Case* ([1937] A.C. at p. 556), agreeing with Lord Wright M.R. (p. 515), that "it would be regrettable if uniformity . . . did not prevail." This being so, a most useful end is served by a collection of the recent German and Dutch decisions on the subject of gold clauses. The two German authors have published all decisions in full, even those merely touching German domestic interests. Consequently the volume is a large one and contains

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[1] *Gold- und Valutaklausel in deutscher und niederländischer Gerichtpraxis.* By Dr. Sack and Dr. Meyer-Collings. (München : C. H. Beck'sche Verlagsbuchhandlung. 1937.) Pp. viii + 336. RM. 9.

336 pages. Nearly all these decisions have been recently published in other reports and legal reviews.

The authors emphasize the fact that their book has been written for Germans; they therefore examine also Dutch cases from the point of view of a German counsel. But the book fails to contribute sufficiently to a comparative legal study of the subject since it neglects the abundant legislation, decisions and professional opinions concerning the same questions in many other countries. The quotations of authors are very freely handled. Professor Nussbaum's numerous important publications on monetary law since 1925 are ignored, even those written in German.

MARTIN DOMKE.

ENCYCLOPÆDIA OF CIVIL AND COMMERCIAL LAWS.[1]

SINCE our last notice[2] of this long and valuable compilation four more parts have been issued, and the end is now in sight. The last article is on *Testament*. The fact that it covers nearly 50 pages of double columns, long octavo, gives some idea of the scale of the book.

A work of this kind does not lend itself to review. Speaking generally, it may be said that no library of comparative law can afford to be without it. The articles are up-to-date and are supplemented by a full bibliography. The work is to be warmly recommended to all students of comparative law.

F. P. W.

We have also to acknowledge:[3]

The Legal Status of Aliens in Pacific Countries. Ed. by Professor Norman Mackenzie. (London: Humphrey Milford.) Pp. xii + 374. 21*s*.

Ridge's Constitutional Law of England. 6th Ed. By A. Berriedale Keith. (London: Stevens & Sons.) Pp. l + 642. 21*s*.

Comparative Commentaries on Private International Law. By Arthur K. Kuhn. (London and New York: Macmillan & Co.) Pp. xii + 381. 20*s*.

The Law of Gaming. By Howard A. Street. (London: Sweet & Maxwell.) Pp. lxiii + 760. £2 2*s*.

The Standardization of Commercial Contracts in English and Continental Law. By O. Prausnitz. (London: Sweet & Maxwell.) Pp. xix + 155. 10*s*. 6*d*.

Monetary Nationalism and International Stability. By F. A. von Hayek. (London: Longmans, Green & Co.) Pp. xiv + 94. 5*s*.

Constitutional Laws of the British Empire. By W. Ivor Jennings and the late C. M. Young. (London: Humphrey Milford.) Pp. xviii + 364. 18*s*.

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[1] *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes.* Edited by Dr. Franz Schlegelberger, vol. vi, Parts 4–7. (Berlin, Franz Vahlen.)

[2] See *Journ. Comp. Leg.*, Third Series, vol. xix, p. 131.

[3] Mention here does not preclude a review later.

Private International Law of Succession in England, America and Germany. By Dr. jur. Walter Breslauer. (London: Sweet & Maxwell.) Pp. xxviii + 339. £1 1*s.*

A Handbook of Public International Law. By T. J. Lawrence. 11th Ed. By Percy H. Winfield. (London: Macmillan & Co.) Pp. xvi + 207. 3*s.* 6*d.*

Le Nationalsocialisme Allemand: ses Doctrines et leurs Réalisations. By Dr. H. Mankiewicz. (Paris: Librairie Générale de Droit et de Jurisprudence.) Pp. xxiv + 248. Frs. 45.

Die Verwaltungsorganisation der Kolonien in tropischen Afrika. By Dr. jur. Wilhelm Wengler. (Munich: Duncker & Humblot.) Pp. 62. RM. 2.80.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bombay Law Journal; Bombay Law Reporter; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Headway; Hindustan Review; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal de Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Revista de Ciencia Juridicas y Sociales; Revista de Identificacion y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; South African Law Journal; Studi di Diritto Industriale; Tulane Law Review; Wisconsin Law Review; Zeitschrift für Ostrecht.

ENGLISH LAW AND THE HISTORY OF CONTINENTAL LEGISLATION.[1]

[*Contributed by* DR. MAX GRÜNHUT, *formerly Professor of Law in the University of Bonn.*]

THE influence of English law on modern Continental legislation was connected with, and a sequel to, the rise of European constitutionalism. This was a part of the movement of Enlightenment, which originated in England and was spread all over the Continent by French philosophers and political writers. Montesquieu's *Esprit des Lois*, first published in 1748, was influenced by the reading of John Locke more than by the author's own personal impressions in England. In France at least, from that moment onwards the wind never ceased " to blow from England "—to quote a contemporary catchword.[2] These liberal ideas, however, were superseded by the revolutionary ideal of popular sovereignty, when " Anglomania " became, in the words of Robespierre, " a mask of reactionary treachery." And indeed, the reaction against the Revolution, both during and after the reign of Napoleon, derived its best arguments from Edmund Burke, whose doctrine became the foundation of the historical school of the nineteenth century, while he himself always remained the steady and faithful partisan of the English constitution of 1688.

The wave of constitutional legislation, which spread over the Continent in the first half of the nineteenth century, was a political offspring of English constitutional thinking, though in no way in harmony with the political structure of contemporary England. There were, it is true, important differences between these various constitutions: some of them emphasized the monarchical principle, while others were developed on distinctly democratic lines. A nucleus of ideas, however, was common to all of them and was handed over from one legislative system to the other through the agency of a mutual reception of foreign law. Thus we find many instances of historical interdependence between the constitutional legislations of the various European countries. So far, what is called the genealogy of the Continental constitutions evidently shows an unhistorical element, a late effect of Enlightenment and the Law of Nature.[1]

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[1] This article is based on a lecture given by the author in the University of London on October 20, 1937.

[2] I. Ch. Collins, *Montesquieu in England*. *Quarterly Review* (1903), pp. 331–63. Jos. Dedieu, *Montesquieu et la tradition politique anglaise en France*, Thèse let. Bordeaux, Paris, 1909. *Idem*, *Montesquieu* (Paris, 1913). G. Bonno, *La constitution britannique devant l'opinion française* (Paris, 1931).

In the principal European countries the new legislative activity was by no means limited to constitutional law. In all branches of the law they developed a modern legislation, most of it in the form of comprehensive codes, typical of the nineteenth century. The law of procedure may well be selected as a general topic to illustrate the influence of English legal institutions and thinking on some practical aspects of Continental legislation.

Criminal Procedure.—In the field of criminal procedure, the most important and best-known instance of English influence on Continental legislation is trial by jury.[2] This is an admirable example of how a legal institution travels through the ages from nation to nation and changes its purpose. The historical source of the jury was the Franconian *inquisitio.* The IV Lateran Council (1215) prohibited clergy from taking part in any religious ceremony in connexion with ordeals. In England this was the main starting-point for the further development of the jury. In Italy, however, a new form of procedure arose and borrowed from the Franconian *inquisitio* both the name and the idea of prosecution by official initiative. In this new inquisitorial procedure, inaugurated by Canon Law and completed by the secular Italian law school, the judge had to initiate the trial and to direct the evidence, of which the main forms were witnesses and confession. Jurisprudence built up an artificial system of an increasing number of legal rules of evidence, the aim of which was to guarantee the highest degree of truth with an alleged mathematical security. To satisfy this requirement, confession as the " queen of evidence " was to be enforced by torture. The main stress was laid on information. The duties of the court included neither the hearing of witnesses nor that of the defendant in person, and the judges had to decide according to written depositions, which embodied the result of the evidence. This inquisitorial procedure spread from Italy over the Continent. It was codified in Germany by the Carolina, the law of criminal procedure of the emperor Charles V in 1532, and renewed in France by the Ordonnance of 1670, a special code proposed by Colbert.

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[1] C. Bornhak, *Genealogie der Verfassungen* (Berlin, 1935).

[2] See for full details the comparative study by Hermann Mannheim, " Trial by Jury in Modern Continental Criminal Law," *Law Quarterly Review*, vol. liii (1937), pp. 99–117; 388–412.

English forms of criminal procedure were brought to the notice of Continental thinkers in the wake of English constitutional ideas. Trial by jury had a remarkable place within the system of Montesquieu. In a stricter sense than Locke he separated the judicial function from the other public powers and isolated it with the aim of diminishing the danger to the citizen involved in the overpowering authority of the judge. It was as an instrument to make innocuous the exaggerated power of the criminal judiciary that he recommended the jury. "In England," he points out, "jurors have to find whether or not the facts, brought before them, were proved, and if they so find, the judge has to do nothing but to pronounce the penalty the law threatens for that very offence." "Thus the law itself," in the words of Voltaire, "judges according to a fact proved, and not to an arbitrary judicial decision." The French people felt a deep distrust of criminal justice in its old form. In the famous trials of Calas, Sirvans and La Barre, Voltaire himself was a passionate defender of persecuted innocence. English trial by jury, therefore, with its evidence and cross-examination in open court, free from the abuses of torture and arbitrary arrests, seemed a precious safeguard of personal liberty. This was a unanimous feeling underlying all the struggles for the best form of constitutional law. In the beginning of the Revolution, the "*cahiers*," while refusing the English constitutional pattern of a two-chamber system, asked for the jury—in the words of the *cahier* of the *tièrs état* of Paris—"*l'institution plus favorable à la sûreté personnelle et à la liberté publique.*" So, by the law of September 16–19, 1791, the National Assembly introduced the jury in both its forms, for the indictment as well as for the verdict. During the following years, the revolutionary ideas were all compromised by bloody terrorism. After the *coup d'état* of 18th Brumaire, Napoleon began to rebuild the State. He ordered a comprehensive codification of French law, which is still in force and known by the Emperor's name. Most of the judges were opposed to the introduction of the jury, that "pleasant dream of philosophy." They charged it with unjust and dangerous acquittals of obvious criminals. Nevertheless, Napoleon decided in its favour. As public feeling about the jury was divided, he did not want to interfere, and he considered trial by jury to be the best way to avoid the misgivings caused by the old artificial rules of evidence. The jury was, therefore, established by the *Code d'Instruction Criminelle*, November 17, 1808.

The principal cause of the reception of the English jury in France was the distrust of State courts and judges. Owing to this distrust, French law adopted two peculiar doctrines. First, the strict separation between facts and law. It is true that even in England the old phrase of Plowden's held good: "*Ad quaestionem legis respondent judices, ad quaestionem facti juratores.*" But what is the meaning of "facts" in this context—this is the problem at issue. In England, the separation has never been formalistic as it came to be in France. The French friends of the jury wished to confine the judge to a merely mechanical application of the letter of the law, and to entrust the jurors with a task they would be able to perform—the rendering of the verdict on a pure set of facts, without any legal complication. A strict distribution of powers of this kind seemed to be an automatic safeguard of political liberty. In practice, of course, this system could not work. The judges, when formulating the questions to be directed to the jurors, were faced with the alternative of either splitting up the crime into a confusing number of single facts, or of using the legal terms and of letting the jurors decide, whether or not the facts they held proved constituted a criminal offence according to law. This experience had a great influence on substantive law. In order to facilitate the task of the jury, the *Code pénal*, in 1810, endeavoured to replace legal expressions by clear definitions in terms of facts. This made the French penal code a remarkable model for other countries, especially Bavaria (1813), Prussia (1851) and, through the influence of the latter, Germany (1870).

The second French idea was the doctrine that the uncontrollable, merely personal impression of the jurors was a particular form of evidence, the so-called "*conviction intime.*" In England, where the jurors had to decide "upon the evidence placed before them in court," trial by jury required a strict law of evidence, which—according to a well-known saying—is a child of the jury. In France and thereby on the whole Continent, one of the principal aims of trial by jury was to abolish the traditional law of evidence.

To understand this contrast, we ought to bear in mind that the law of evidence, which had been developed with the English jury-system, and the Continental law of evidence, which was to be removed by the new jury-system, were two different things. In the first place, English law of evidence seeks to exclude doubtful means of proof and to procure sufficient material from the best available sources. But since all evidence must be given *viva voce* and in open court, in spite of the formal character of the rules of evidence, the result of their application is ultimately left to the jurors' own conscience, precisely in the way in which historical truth is always established. The English jury is bound—in the words of Thomas Smith (*Republica Anglorum* (1565))—"*ad facti veritatem dicendam secundum probationes in iudicium deductas et conscientiam suam.*" On the other hand, the jurisprudence of Continental Roman law had shaped an entirely different law of evidence. It was concerned with the question of the legal value of abstract forms of evidence and had a twofold aim—to protect first the defendant against an unjustified conviction, and secondly, the community against too scrupulous acquittals. An ever-increasing number of strict rules compelled the court to decide between the two alternatives of conviction or acquittal by a legally prescribed and almost mathematical process of reasoning applied to the quantity and quality of the means of proof forthcoming in a given case. The written form of inquisitorial procedure lured the judge, who never saw either witnesses or prisoners in person, into a mechanical reckoning with units and degrees of evidence. Only this unnatural system can explain why, on the Continent, for more than three centuries torture was a legal method of achieving a confession.

All these artificial methods came to an end with the introduction of the jury. Jurors could not decide on depositions, but only on personal impressions, received at the trial itself. And no law could regulate *in abstracto* what evidence was "half proof" or "full proof," if jurors had to decide unanimously or by majority. Here we find the true link between trial by jury in open court and what, in contrast to the old legal rules, we call "*freie richterliche Beweiswürdigung*,"—the principle of a freely weighed evidence. However, as not infrequently happens, an important parting of the ways led to an unreasonable exaggeration of the new principle. It was like a romantic return to nature, that the jury itself with its "*conviction intime*" came to be regarded as a sacred source of genuine truth. "The jury," exclaimed Duport, one of its supporters in the National Assembly, "is a phenomenon of the primitive, bearing the scent of the woods, from which it comes down, the strong breath of nature and instinct. . . . You need a pure and strong soul, to feel all its beauty . . . but the best of all is, that everything would be decided by justice and goodwill—instead of that turmoil of formalistic intricacies, we have called judicature."

On the Continent, the jury problem from its very beginning has been burdened with these two doctrines, of separation between law and fact, and of "*conviction intime.*" In Germany, the discussion was opened by Anselm von Feuerbach, well known as a scholar and framer of criminal legislation. From a political point of view he recognized the jury as an essential institution of a liberal commonwealth, but from a merely legal standpoint he warned his countrymen against the French model, as by no means fit to be an instrument for the main purpose of all criminal procedure : to find the truth. Strictly to isolate facts from legal conceptions he held to be impossible. And—in his opinion—an uncontrolled personal impression of laymen would be a dangerous basis for so great a responsibility. In the struggle between the old system of formal proof and the enthusiastically praised French model he recommended as a compromise merely negative rules, to exclude unsuited and misleading forms of evidence. This suggestion he believed to be in harmony with English law, the superiority of which lay, in his opinion, in the way it bound the jury by the law of evidence.

No doubt, criminal procedure in Germany urgently needed reform.[1] Austria, Bavaria and the Eastern Provinces of Prussia had an inquisitorial system, but without torture, while in the Prussian Rhineland French law had been introduced in 1798. Here, therefore, there was an opportunity of studying the jury on German soil. "No young professor," said Feuerbach mockingly, "comes back from his holiday on the Rhine without preaching the new gospel of trial by jury." A royal commission, entrusted in 1818 with an investigation into the methods and possibilities of assimilating the two systems, reported in favour of public oral trial, freely weighed evidence and the jury as the only instrument capable of checking and restricting a criminal court thus freed from all the old fetters. They also rejected the so-called negative theory of evidence suggested by Feuerbach. Once more, free weighing of evidence and trial by jury seemed to be inseparably connected. It was Savigny only who pleaded for professional judges applying unrestricted forms of procedure, according to the Dutch pattern.

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[1] Landsberg, *Das Gutachten der Rhein Immediat-Justiz-Kommission*. Publik. d. Gesellsch. f. rhein. Geschichtskunde 31 (Bonn, 1914); E. Schwinge, *Der Kampf um die Schwurgerichte bis zur Frankfurter Nationalversammlung* (Breslau, 1926).

But the jury was the favourite aim of the liberal movement. The politicians, whether friends or foes of the jury system, identified the French model with the jury as such. In vain learned jurists like Mitermaier, Hepp and others recommended the English tradition and emphasized that the English law of evidence, including cross-examination by both parties, was suitable for trial by jury. Too late, R. von Gneist called for a German way of empanelling an independent jury.

The year 1848 became the " turning-point of German criminal procedure"—to quote Reinhold Köstlin, a follower of the Hegel school and a sincere supporter of the jury. Though the so-called *Paulskirchen* Constitution has never been enforced, the new principles of criminal procedure, which it contained, were embodied in particular statutes by all German States. In Austria, after a short period (1850–2), the jury was newly introduced in 1873 by the Code of Criminal Procedure, the work of Julius Glaser. It was due to his far-reaching studies in legal history and comparative law that he succeeded in making the old Pilate question of truth and of the best way to find it the focus of all legal procedure. He suggested a freely weighed evidence as the best way to truth both in law and in history, but he wished it to be combined with a threefold system of legal rules, concerning first the selection of evidence, secondly the direction of evidence and thirdly the manner in which the legal functions are to be divided between court and parties. It is no paradox to say that what he emphasized was a reasonable law of freely weighed evidence. Thus he cleared the way for a better understanding of the English law of evidence and the genuine form of trial by jury, which he had learnt to appreciate since his own studies in England in 1851.

Julius Glaser had a favourable influence on Continental doctrines of legal procedure. Nevertheless, the destiny of the jury-system could not be averted. After the Great War the jury-system was reformed and transformed in most Continental countries.[1] The aim was to bridge the old traditional twofold separation, the separation of court and jury and the separation of their respective tasks. Generally speaking, there were two main ways in which modern reform statutes have sought to arrive at this aim. Either the new legislation gives the jurors a full share in the determination of the penalty. Following the example of the Canton of Geneva, this course has been pursued in France, Belgium, Spain and

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[1] See Mannheim, *loc. cit.*, pp. 400 *et seq.*

Austria. In this case, the difficulty is how to provide the laymen with the legal advice needed for the performance of the strictly judicial function without endangering the independence of their verdict. Or, as the statutes of Germany, Italy and the Canton of Berne have provided, judges and laymen are combined so as to form a single bench with equal powers for each member of the court so constituted, and the jurors become in fact lay assessors. For this type, Germany had already an example in the "*Schöffengerichte*," first introduced in Hanover in 1850 for the purpose of providing a bench to try petty offences in first instance.

On the Continent, the twentieth century has not been favourable to the jury. Nevertheless, from a general standpoint, the jury has remarkable importance in Continental legal history. The struggle about the jury has had two valuable effects. First, in France and in Germany, the introduction of the jury-system gave rise to the modern form of substantive criminal legislation with a rational system of crimes and penalties and with clear definitions intelligible to laymen. Reinhold Köstlin had rightly prophesied, when he said: "Indeed, what would be better for our formalistic penal codes than to undergo the ordeal by fire of an oral trial by jury—what slag would then be smelted!" Secondly, the jury was the most effective power in the transformation of the written inquisitorial procedure into the reformed public oral trial and free weighing of evidence. Thus trial by jury, grown in England out of a common Germanic root, helped on the Continent to overcome what had been one of the less desirable effects of the Reception of Roman law.

Civil Procedure.—In contrast to criminal procedure, no branch of Continental law shows so great a number of different features and historical changes as the law of civil procedure. Since civil procedure has to leave to the parties a good deal of responsibility, they are frequently tempted to abuse their rights, whereby every legal form is exposed to the risk of degeneration. Broadly speaking, there are and have been on the Continent three main types of civil procedure. First a procedure, strictly laid down for written forms of pleading, fixed terms and periods, with the dual aim of educating the parties and of safeguarding them against unexpected judicial inquisitions. This was characteristic of the Common Law procedure in Germany, from the sixteenth to the eighteenth century, and its main drawback consisted in its unnatural intricacies, a serious obstacle to truth and justice. The second type was the logical reaction to the first and the result of a liberal frame of mind. Party initiative was to be freed from all undue restrictions. Both the plaintiff and the defendant were permitted to amend their oral pleadings up to the end of the trial. The judge weighed the evidence freely, but the parties had the power of putting one another upon oath, and thus of compelling the court to pronounce judgment either for the plaintiff or for the defendant. To this group belong the French Code of Civil Procedure of 1806 and the German Code of Civil Procedure in its original form of 1878. In this system, however, the parties were in too powerful a position, a fact which was liable to endanger the speedy victory of a just cause. The third type, therefore, aimed at strengthening the power of the court, not by a renewed system of formal rules, but by a reasonable discretion left to the judge. This is the idea of what we call "*Richterliches Prozessleitungsamt*," the office of the judge to direct the suit, an expression first coined by the Romanistic jurist Puchta. Of this type are the Austrian civil procedure, the work of Franz Klein, the civil procedure of Berne, framed by Judge Alexander Reichel, and the recent form of German civil procedure, first introduced before special Labour Courts in 1927, and now generally adopted for all courts.

It is in the transition from the second to the third type that we can trace English influence. This was exercised at Geneva and came from Jeremy Bentham, through the agency of Etienne Dumont. Opinions as to Jeremy Bentham are still divided, both at home and abroad. To a philosophical and historical mind, he presents himself as what Professor Sainsbury calls "a curious man, with his complete neglect of all nobler elements of thought and feeling," a strangeness enhanced by endless repetitions of the greatest happiness principle, borrowed through Priestley from Beccaria, by an untiring and tiresome tracking down of superstition and selfishness, and not least by a difficult style. On the other hand, it was due to his ardent zeal that Blackstonian optimistic conservatism was overcome, and thus the way cleared for reform, so urgently needed in view of the industrial development and the social changes of the eighteenth and nineteenth century. He was, according to John Stuart Mill, "the inventor and patentee of legal reform," and while he disregarded all declarations of constitutional principles and Rights of Man, he emphasized the value of special legislation, based on experience, as a reasonable means to solve social problems. Whenever we see in Europe during the nineteenth century legislative reform framed upon a non-political basis of social experience and scientific research, this is undoubtedly an effect of what may be called latent Benthamism.[1]

Bentham's first work, *The Fragment of Government* (1776), so impressive by its pungent criticism of Blackstone's doctrinal system, did not find its way to the Continent. All the influence Bentham gained there he owed to his famous interpreter, Etienne Dumont. Outside England, the latter was better known and more highly esteemed than the master himself. "I never understood," said Goethe, "how so clever a man as Dumont could be a disciple of this fool Bentham, who as an old man finished his career by becoming a radical." "Dumont," he continues with a remarkable confession, "is a moderate liberal, as all reasonable people are or ought to be, and as I am myself, and so I have tried at least to do my work through my long life." [2]

When in 1813 the Canton of Geneva, after fifteen years of French rule, regained its independence, and, one year later, joined the Swiss Confederation, the French legislation meanwhile adopted had to be revised. This was the great opportunity for Dumont, then a member of the State Council, to give application to the reform ideas of Bentham, outlined twelve years before in his *De législation civile et pénale.* "We are diligently labouring at the organization of our judiciary establishment," he wrote to Bentham on March 23, 1816. Two years later, he reports on his endeavours in criminal law, as regards which his countrymen did not at all agree with his suggestions of strict rationalistic principles—"the innate love of something arbitrary triumphs." [3] Here, indeed, he was not successful. His main contributions were a draft code of 1821, and a preliminary *Exposé,* published in the year of his death, 1829. Both failed to become a basis for the new code, which was only enacted in 1874.[4]

It was the law of civil procedure in which Bentham through Dumont exercised important influence at Geneva, and this is, according to Professor Fritzsche, "a very rare case of the influence of one single thinker upon Swiss legislation." [5] This was the result of the personal contact between Dumont and the author of the *Code de procédure civile genèvois* of 1819, P. F. Bellot, then a highly esteemed jurist. With Dumont and P. Rossi, an Italian jurist from Bologna and also a follower of Bentham, Bellot formed at Geneva what a contemporary writer called "*un triumvirat de science et de lumière.*" Bellot, in particular, appeared as a "master of synthesis." In his Legislative Considerations, printed and reprinted as the best commentary upon the Genevan law of civil procedure, he repeatedly declared how deeply he was indebted to Dumont for giving him access to MSS. of Bentham's and for important personal suggestions. He subjected the French Code of Civil Procedure of 1806 to an analysis from the utilitarian point of view. It is true that this code had the great advantage of introducing oral trial in public for the first time. But Bellot was right, when he criticized the law, where it was less favourable to the parties than to fiscal interests or to the selfishness of the legal profession, the "*hommes de lois,*" whom Bentham would mockingly call "Judge & Co." More important, however, were the new institutions he introduced into the law of civil procedure. He certainly did not agree with some of the more extreme suggestions of Bentham, and, for instance, refused to accept the abolition of oaths, though recommended by the master. What he did was to add three institutions to the French pattern. First, a new type of preparatory proceedings, much in the nature of a "summons for directions"; secondly, an informal hearing of the parties at the trial itself, and thirdly the examination of the witnesses in open court. By combining these three innovations he strengthened the power of the judge to achieve his noblest aim: to give judgment in accordance with truth and justice. By doing so, he adhered to Bentham's general critical suggestions rather than to the corresponding institutions of English law itself.

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[1] Colman Philipson, *Three Criminal Law Reformers*, 1923, pp. 194 *et seq.*

[2] February 3, 1830.—J. P. Eckermann, *Gespräche mit Goethe*, Ausgabe Reclam II, p. 202. Fl. von Biedermann, *Goethes Gespräche*, Gesamtausgabe, 2 Aufl. 4. Bd. p. 203 (Leipzig, 1910).

[3] Bentham's Works, Ed. Bowring, vol. x, pp. 487 and 490 *et seq.*

[4] Alb. Dunant, *Notice historique sur la législation pénale du Canton Genève*, Schweiz. Zeitschrift f. Strafrecht 3 (1890), pp. 178 *et seq.*

[5] Schurter—Fritzsche, *Zivilprozess der Schweiz* II, l. *Geschichtliche Grundlagen der kantonalen Rechte*, p. 20 *et passim* (Zürich, 1931). The author also owes to Professor Fritzsche valuable information on Dumont and his relation to Goethe.

This was a remarkable step towards the modern form of procedure, taken at a time when elsewhere the French law still remained in high esteem. In Austria, Julius Glaser, ever since he had studied English law, repeatedly suggested an informal hearing instead of the right of the parties to put one another upon oath. The Austrian Code of Civil Procedure of 1895 is a classic piece of legislation, based on the principles which had for the first time been introduced by Bellot, to whom its author Franz Klein was deeply indebted. Germany, on the other hand, until fifteen years ago showed reluctance to follow the tendency of strengthening the power of the court and of weakening the initiative of the parties and their responsibility to decide for themselves what should and what should not be put before the court. Neither Bellot's precedent, although appreciated in theory, nor the English pattern recommended by Glaser and von Bar and by a few members of the parliamentary committee, led to the substitution of the informal hearing of the parties for their right to put one another upon oath. The classic authorities on German civil procedure, Wach, Stein, Richard Schmidt, stood for the latter. The change has come in recent years, under the influence of Austrian jurisprudence and in accordance with modern statutes and drafts in Switzerland and Italy, and has been laid down in an amendment to the code of October 27, 1933.

Administrative Justice.—The adoption of trial by jury in France and the influence of Benthamist reform ideas on civil procedure at Geneva are not the only examples of relationship between English law and Continental legislation. Another instance is furnished by administrative justice in Germany. It was Bentham who, throughout his work, kept all solemnly pronounced constitutional principles in the background and emphasized the necessity for well-drafted special enactments. But from a truly realistic legal standpoint, one has to go one step farther and to examine whether or not the day-to-day public administration is conducted in accordance with law. It was Rudolf von Gneist who strove to achieve this aim in Germany and to create effective safeguards for its realization.[1] Rudolf von Gneist was a disciple of Savigny, and though always faithful to historical learning, yet as time went on he turned increasingly to politics and to the new branch of public law. He was also a man of critical mind, and as professor at the University of Berlin his lectures were less famous for his description of positive details than for his analysis of general lines of historical and legal development and for his own personal ideas and critical suggestions. An important basis of all his work was his research into English legal history, the results of which are to be found in the volumes of his repeatedly enlarged work on English Constitutional and Administrative Law. It was his special purpose to investigate the origin and the cause of the efficiency of English Local Government, or of what in view of its alleged political character he called Self-government.

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[1] See the searching essay on Gneist's scientific and political endeavours by Munroe Smith, *A General View of European Legal History and Other Papers*, pp. 215–55 (New York, 1927).

In legal history, administrative justice appears to be a sort of no-man's-land within the traditional distribution of public functions. As Dr. Robson says, there are some functions of government which are incapable of classification into legislative, executive and judicial powers. The violent contest which arose when both judiciary and administration claimed control over the same field was further accentuated by the fact that what was at stake was no less an object than the enforcement of the doctrine of the supremacy of law. In Continental legislation, as in the English Common Law, this doctrine is a principle of fundamental importance. According to Roscoe Pound, the essence of this principle is that the sovereign of the State and his agencies have authority to act only within legally appointed limits. German nineteenth-century jurisprudence formulated the word "*Rechtsstaat*," *i.e.* the state built up by, and based on, law. This term was first coined by Robert von Mohl in 1856, and became famous through its definition by Julius Stahl, the philosopher of political conservatism.

An open conflict between law courts and administrative bodies first broke out in France.[1] From 1626 onwards the French *Parlements* fought against the royal *Intendants* and their executive justice. The Edict of St. Germain of 1641, probably a work of Richelieu, was a remarkable attempt to settle the whole dispute. It left to the *Parlements* jurisdiction over the subjects' lives and properties only, and enjoined them to abstain from interfering with all matters even potentially concerned with the State itself, with its administration and government. But there was no truce: the struggle went on; and, in spite of a short victory for the *Parlements* in 1648, "*la justice retenue*," *i.e.* a wide field of special cases reserved for the jurisdiction of the royal *Intendants*, remained as a typical institution of the old régime until the Revolution. Nor was revolutionary legislation favourable to the law courts, which were accused of protecting the privileges of the nobility. While, on the whole, the new idea of popular sovereignty proved stronger than Montesquieu's constitutionalism, in this very case the principle of distribution of powers was strictly adopted. By an "Organization Act" of August 16–24, 1790, judges were forbidden to disturb the operations of administrative bodies by summoning before them officials on account of the exercises of their functions, and this remained the fundamental principle throughout the nineteenth century. Administration remained the prerogative of the sovereign, whether emperor, king or parliamentary cabinet, and so also did administrative jurisdiction. The Council of the State, the supreme instance, was in theory regarded as a committee only tendering advice to the sovereign, who gave the decision. After a first attempt in this direction during the 'forties, the legislation of the Third Republic in 1872 succeeded in strengthening the judicial guarantees of administrative tribunals, and abolished the need to obtain the consent of the chief of administration to decisions of the Council of State in contentious matters. This was what in French jurisprudence is known as the step from the old "*Justice retenue*" to the modern "*Justice déléguée.*"

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[1] E. Laferrière, *Traité de la juridiction administrative*, 2 ed., Tome 1 (Paris, 1896).

Germany, by way of contrast, had a long tradition favouring the unrestricted power of the law courts.[1] From the sixteenth to the eighteenth century the right of the subject to sue his Government before the imperial courts was never doubted. On the other hand, as absolutism grew up, the princes of the German territories successfully prevented their subjects "from having in mind so vicious and godless a dealing against their hereditary sovereign and Government." Within their territories they built up new special authorities in order to give effect to the increasing military and economic activities of the State. These were the so-called District and Domain Chambers, which were empowered to decide all cases relating to Crown lands and other administrative matters, the Crown being the supreme instance. Thus, in Prussia, the jurisdiction of the chambers overshadowed the old law courts. Towards the end of the eighteenth century, reformers, influenced by the idea of Enlightenment, began to suggest a strict separation between judicial and administrative powers. "A cameralist [administrative official] ought to be almost more than merely human," said the Prussian Chancellor von Goldbeck in 1795, "to keep firmly in hand the scales of justice without any prejudice in favour of fiscal interests if the case is one of doubt." At a time when ideas of this kind were under discussion in connexion with the organization of the then recently acquired Eastern and Western Provinces, a grave crisis came upon the Prussian Monarchy through the Napoleonic Wars. After the Congress of Vienna, there was in the re-established German States a marked tendency to strengthen the power of the executive and to reserve to administrative authorities the jurisdiction over administrative matters even of contentious character. Consequently, the liberal opposition turned against all administrative tribunals and their French models. The abortive *Paulskirchen* Constitution of 1848 laid down: "Administrative jurisdiction shall terminate; all violations of law shall be subject to the jurisdiction of the courts." The leading voice in this movement was that of Otto Bähr, a Hessian judge, who in his book "*Der Rechtsstaat*" emphasized the idea that supremacy of law could be enforced in no other way than procedure before, and decisions by, the courts, whatever be the character of the litigation, and even though the State be a party to it. These tendencies, however, remained without any great influence on modern public law in Germany. They were soon superseded by the new suggestions of Rudolf von Gneist, based on his studies on English legal history.

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[1] Edg. Loening, *Lehrbuch des deutschen Verwaltungsrechts*, pp. 771 *et seq.* (Leipzig, 1884); *Idem*, *Gerichte und Verwaltungsbehörden in Brandenburg-Preussen* (Abhdl. u. Aufs. 1) (Halle, 1914).

Gneist first approached these matters in connexion with the struggle about the jury. What he was looking for was a neutral body for empanelling jurors in a non-partisan way, and that, in his opinion, would best be found in local authorities according to the English pattern. As the typical features of English Local Government he described the Justice of the Peace, the Jury and the Quarter Sessions, and he understood these institutions as beneficial links between "State and society," and as the only sound basis for Parliament. As the essence of these institutions he emphasized three characteristics, which he regarded as fundamental: the honorary office, the public oral trial and a regulated approach to a higher instance. It was in accordance with the political character of these legal institutions as understood by Gneist that he applied to them the term Self-government. In his book, also entitled "*Der Rechtsstaat*," published in 1872, he recommended these forms as the only true safeguard for the supremacy of law and as the best way to subordinate public administration to the rule of law.

As far as administrative justice was concerned, in making these suggestions he fought against two fronts. On the one hand, in his opinion, the decision of causes, in which questions of public administration were involved, ought not to be left to judges, who derived their experience from civil cases only. For the core and nucleus of all administrative justice is the problem of public compulsion and of just and equal standards of its application, and this obviously requires a special training and long experience, which can be gained by members of administrative authorities only. On the other hand—as von Goldbeck had stated—the official who has to apply public power for administrative purposes is not and cannot be the proper person to protect personal liberty against abuse of the very same public power. In this negative conflict Gneist saw the solution in the thoroughgoing reform of the administrative bodies by equipping them with the well-established judicial guarantees of modern courts of justice. It was with this object that he emphasized the decisive features of English Local Government: participation of laymen as honorary officers, public oral trial and higher instances with the power to overrule the decision both in fact and in law.

From a political point of view, Gneist followed the best tradition of German Liberalism. The basis of public life—this was the main idea of German Liberalism—was to be reinforced by freeing the subject from all unwarranted fetters of Governmental tutelage and by imposing new obligations to public activity on the citizen, habitual personal service being the best training for political citizenship. This had been the aim of Freiherr vom Stein, who, in the beginning of the nineteenth century, wished to shape " a new common spirit, created by personal participation in public life, originating in the attachment to local corporations, to the parish, to the province and gradually rising to a true, genuine patriotism." In the same way Gneist pointed out: " Once citizens have been accustomed to a lawful, responsible self-government within their own narrowest circles, then they will gain both the ability to, and the right of, self-government in politics in general." On the other hand, it must be admitted, that from a strict historical standpoint, it may be doubtful whether Gneist adequately described the essentials of English Local Government. Younger historians sharply criticized him for overlooking the recent development since the Reform Acts and the increasing rise of elected bodies with the power to vote expenses and to appoint salaried officers. Once again a foreign admirer had recommended to his countrymen English legal institutions belonging to the past and already transformed in their own country, and studies in comparative law had been tainted by the author's own personal and political predilection.

In order to form a proper judgment, one has to bear in mind that Gneist, while fighting for Liberalism, had to defend it against two adversaries. One was old caste-bound conservatism and bureaucratic absolutism, the other one the exaggeration of democratic institutions in France, where the whole public life tended to be surrendered to the changing majorities of selected bodies. He considered personal, responsible co-operation in public affairs to be the most valuable counterbalance against these dangers, and for that he found the best example in the older forms of English Local Government. As to the special purpose of administrative justice, an English expert recently confirmed that "the mixture of the administrative and the judicial was characteristic of English Local Government right down to the nineteenth century.[1]

Gneist's ideas were extremely successful in the field of practical legislation. "Perhaps never before," said Otto von Gierke in his memorial speech, "had a scholar, although not being in a leading position permitting direct control of public life, so deeply impressed the stamp of his own mind on the legislation of his country." The first beginning of this influence was partly due to an incident. In 1870, when the newly created North German Diet enacted a Federal Poor Law, they had to build up a special Federal Poor Law Settlement Authority to deal with controversies arising between different local corporations. This new office had to decide as an independent body in judicial form and spirit, and therefore became the first modern administrative tribunal in Germany. This step was soon followed by the Prussian legislation, when, two years later, the Prussian district authorities were reformed by a statute, which extended to the country the organization which Freiherr vom Stein long before had introduced in his Town Ordinance of 1808. In the first and middle instances of the administrative organization there arose a new form of boards composed of professional officials and honorary members. Their tasks were twofold: they had to discharge a limited number of merely administrative duties, and, at the same time, they had to decide litigious cases arising from administration. When this Bill was discussed in the Prussian Chamber, a prominent liberal member welcomed the reform as one by which "in contrast to the hitherto prevailing State administration, the nation comes of age," and saluted it "as the Magna Charta of the Prussian people." This legislation was completed by further statutes of 1883 and 1891. The main achievement of the reform movement was the establishment of an independent central court, the Prussian Administrative Tribunal in Berlin in 1875, which became the last instance in all contentious matters declared by law to be suitable objects of administrative justice. It was by the precedents of this tribunal that in Germany the main body of administrative law was built up, which in view of its needs of differentiation and elasticity is less fitted for codification than any other branch of the law.

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[1] Dr. Gibbon before the Royal Commission on Local Government, 1923. Quoted by W. A. Robson, *Justice and Administrative Law*, p. 17 (London, 1928).

Conclusion.—These instances of English influence on Continental legislation may justify some remarks on legal interdependence in general. In the Middle Ages, a town would borrow its law from a foreign place and acknowledge the precedents of the original source as its own law. In modern European legal history, scholars become intermediaries between different systems of law, and it is their mutual scientific intercourse which conveys thoughts and laws from one country to another. According to Roscoe Pound, while the history of English Common Law is a history of courts, Continental legal history is a history of scholars. This statement we have to keep in mind if we would understand the most striking event of European legal history, the Reception of Roman law.

Legal institutions, as they migrate from country to country, are bound to undergo a process of transformation in varying degree, their reception abroad being closely connected with the rise of new theoretical ideas and critical suggestions. In these transformations and alleged misunderstandings of foreign patterns we have to recognize the work of a creative mind, unconsciously building up a new law in harmony with the social needs, ethical traditions and national feelings of its own country and time. Whether or not a system of law yielded to a foreign influence is a matter of smaller importance than the way in which it reshaped the models and assimilated them to its own purposes. A comparative method is a way to better understanding, not only of foreign legal history, but also of the internal forces at work in the building up of a single national law system—like the personal experience in human life so happily expressed by Goethe :

> " If you would know yourself, see what others are doing,
> Into your own heart look, if you will judge them aright ! "

WHAT AMOUNTS TO "CARRYING ON BUSINESS" BY A FOREIGN CORPORATION.

[*Contributed by* A. FARNSWORTH, ESQ., LL.M.]

WHETHER a foreign corporation can be regarded as " exercising a trade " or " carrying on business " in a country is a subject deserving far more ample treatment than can be afforded in this short article. The topic will be considered under two heads, *viz.* as affecting a foreign corporation with liability to income tax and as subjecting it to the jurisdiction of the courts of a country, and from the respective angles of English and of American law.

A foreign corporation may be defined as an association of individuals such as by the law of the country of creation it is a legal person, while, as regards English law, the incidents of legal personality must be such as would, broadly speaking, make the body a corporation had it been created in this country. The position is perhaps best summed up by Hanworth M.R. in *Dreyfus* v. *Inland Revenue*, where, following the dictum of Parker B. in *The General Steam Navigation Co.* v. *Guilloul*,[1] he said :

> . . . if there has been a body established by foreign law, the courts will recognize the juristic status of that body, and thus the court says that the principle of the liability of members of a foreign corporation is to be referred to the law under which the corporation was established, and if the law shows that it was established as a separate entity, then effect should be given to it. . . .[2]

The position in America seems much the same, *viz.* the body must be recognized as a juristic person both by the country of alleged incorporation and by the *lex fori*.[3]

Consideration will now be given to what amounts to " carrying on business" by a foreign corporation under the heads of taxation and of jurisdiction.

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[1] " If the defendant was not liable for the acts of that other (the company) . . . he has a good defence to the action ; and for the defendant it was contended that the plea means to aver that by the law of France he was not liable for those acts but that a body established by French law and analogous to an English corporation were . . . alone liable for those acts."—11 M. & W. 877 ; 13 L. J. Ex. 168 (1843).

[2] 14 Tax Cas. (C.A.) 560, 576 (1929).

[3] *The Liverpool & London Fire & Life Assurance Co.* v. *Oliver*, 10 Wall. 566 ; 19 L. ed. 1029 (1870) ; see also Beale, *Conflict of Laws* (ed. 3), s. 155, 2.

(A) **Taxation :** (i) *English Law.*—For the purposes of the Income Tax Acts, a company is chargeable in the same manner as a person[1]; Case I of Schedule D of the Income Tax Act, 1918[2] charges to tax the profits accruing to any person residing in the United Kingdom from any trade wherever carried on and to non-residents where the trade is carried on in this country. The expression "trade" is, for the purposes of those Acts, statutorily defined as "any trade, manufacture, adventure or concern in the nature of trade."[3] The division of income into mutually exclusive classes[4] prevents the income of a company derived from property or investments being regarded as a trade assessable under Schedule D, the income from the former being assessed upon the annual value under Schedule A and from the latter by way of deduction of tax before receipt ; provision, however, is made for a measure of relief being given to investment companies which results in their tax liability approximating, in certain cases, to that which would have resulted if they had been charged as a trade under Schedule D.[5]

The charge to tax for the purposes of the repealed Corporation Profits Tax and for the current National Defence Contribution was in wider terms, since these taxes charged the profits, *inter alia*, of a company from any "trade or business," including the holding of investments.[6] The terms "trade" and "business" are not necessarily synonymous,[7] though—apart from the schedular classification for income-tax purposes—they would probably be given the same meaning by the courts.

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[1] "Every body of persons shall be chargeable to tax in like manner as any person is chargeable under the provisions of this Act." Rule 1, All Schedules Rules Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40). "A body of persons means any body politic, corporate, or collegiate . . . and any company . . . whether corporate or incorporate," *ibid*, s. 237.

[2] Schedule D. 1. Tax under this Schedule shall be charged in respect of:

(*a*) The annual profits and gains arising or accruing—

(ii) to any person residing in the United Kingdom from any trade . . . whether the same be respectively carried on in this country or elsewhere.

(iii) to any person . . . although not resident in the United Kingdom . . . from any trade . . . exercised within the United Kingdom.

2. Tax under this Schedule shall be charged under the following cases ; that is to say :

Case I : Tax in respect of any trade not contained in any other schedule.

—Income Tax Act, 1918.

[3] S. 237, *ibid.*

[4] Schedules A, B, C, D and E, Income Tax Act, 1918.

[5] S. 33, *ibid.*

[6] For Corporation Profits Tax, see s. 52(2) Finance Act, 1920, and for National Defence Contribution, s. 19 Finance Act, 1937.

[7] *Harris* v. *Amery*, (1876) L.R. 1 C.P. 148, 154 ; but see *Grainger & Son* v. *Gough*, where it was said that "'exercising a trade' is only another mode of expressing 'carrying on a business.'" 3 Tax Cas. at p. 472 ; [1896] A.C. 325.

As good a definition as any of the term "carrying on a trade or business" is that of Cotton L.J. in *Erichsen* v. *Last, viz.* "When a person habitually does and contracts to do a thing capable of producing profit and for the purpose of producing profit, he carries on a trade or business."[1] It is, of course, essential that there should be a continuity in the transactions, but this does not prevent a single purchase and many sales from being a trade.[2] As regards a company, in particular it has been held that, for the purposes of Corporation Profits Tax, if its objects are business objects and are carried out, the company is carrying on a business; a company whose sole income was from royalties from a mining lease,[3] from the rents of a theatre and real estate,[4] from an annuity given as consideration for the financing the construction of a railway,[5] and a company formed for the more convenient administration of family estates and whose sole income was from surface and mining leases[6] have been held by our courts to be "carrying on business."[7]

It is now time to consider what, in the case of a foreign corporation, amounts to "exercising a trade" or "carrying on business" in the United Kingdom so as to render it liable to British Income Tax. The first point to bear in mind is the distinction made by Lord Herschell in his classic judgment in *Grainger & Son* v. *Gough*, where he pointed out that there was "a broad distinction between trading *with* a country and carrying on a trade *within* a country "[1] only in the latter case did the trading attract liability to Income Tax as being "exercised within this country." All the Law Lords in that case quoted with approval the almost equally classic judgment of Brett L.J. in *Erichsen* v. *Last, viz.* :

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[1] 8 Q.B.D. 414, 420 (1881).

[2] *Cape Brandy Syndicate* v. *Inland Revenue*, [1921] 2 K.B. 403. *Martin* v. *Lowry*, [1926] 1 K.B. 550, 565: "A series of retail purchases followed by one bulk sale or a single purchase followed by a series of retail sales, may well constitute a trade"; affirmed [1927] A.C. 321.

[3] *Inland Revenue* v. *Korean Syndicate Ltd.*, [1921] 3 K.B. 258.

[4] *Inland Revenue* v. *Birmingham Theatre Royal Estate Co. Ltd.*, (1923) 12 Tax Cas. 580.

[5] *Inland Revenue* v. *The South Behar Railway Co. Ltd.*, [1925] A.C. 476.

[6] *Inland Revenue* v. *Westleigh Estates Co. Ltd.*, [1924] 1 K.B. 390.

[7] "The receipt by a company of profits from a concession in which it retains an interest is carrying on a business."—12 Tax Cas. p. 205; [1921] 3 K.B. 258.

"If the objects of a company are business objects and are, in fact, carried out, it follows that the company carries on business."—12 Tax Cas., p. 686.

"A company bearing the character of carrying on a business has not lost that character because the particular venture in which it has been engaged has been finished except that the company receives revenue therefrom."—12 Tax Cas., p. 695; [1924] 1 K.B. 390.

"The continuous receipt of annuity payments by a company constitutes the transaction of business."—12 Tax Cas., p. 711; [1925] A.C. 476.

> The only thing we have to decide is whether, on the facts of this case, this company [incorporated and resident in Denmark.—A. F.] carried on a profit-earning trade in this country. I should say that whenever profitable contracts are habitually made in England, by or for foreigners, with persons in England because they are in England, to do something for or supply something to these persons, such foreigners are exercising a profitable trade in England even though everything to be done by them in order to fulfil the contracts is done abroad.[2]

The cases bearing on this topic are far too numerous to discuss fully in this brief article, but it may be said that in all of them the *ratio decidendi* has invariably been, "were the contracts made or the services rendered in this country ?" If so, liability to tax attaches ; a list of the cases will be found in the footnote.[3] A brief statement of the facts in the more important of these cases may be opportune. In *Erichsen* v. *Last*,[4] a foreign cable company had cables connected with this country and at its own offices here received messages for transmission abroad ; it was held that as the contracts for these messages were made in this country, a trade was being carried on here. In *Grainger & Son* v. *Gough*, a French merchant appointed an English firm his sole representatives in this country ; orders were obtained by them, but transmitted for acceptance or otherwise to the foreign principal to whom payment was made ; it was held that a trade was not carried on in this country, as no contracts were made here. In *Nielsen Andersen & Co.* v. *Collins* a foreign steamship company ran a regular service of ships between Denmark and this country, freights being arranged by the agent, N. Andersen & Co., resident here ; it was held, following *Erichsen* v. *Last*, that the Danish company was exercising a trade in this country, since the contracts were made here.

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[1] 3 Tax Cas., p. 467 ; [1896] A.C. 325.

[2] (1881) 8 Q.B.D. 414, 418.

[3] *Erichsen* v. *Last*, (1880) 7 Q.B.D. 12 ; (1881) 8 Q.B.D. 414 ; *Werle & Co.* v. *Colquhoun*, (1888) 20 Q.B.D. 753 ; *Grainger & Son* v. *Gough*, [1896] A.C. 326 ; *Weiss Biheller & Brooks Ltd.* v. *Farmer*, [1923] 1 K.B. 226 ; *Wilcock* v. *Pinto & Co.*, [1924] 1 K.B. 304 ; *Maclaine & Co.* v. *Eccott*, [1926] A.C. 424 ; *W. H. Muller & Co. (London) Ltd.* v. *Lethem*, [1928] A.C. 34 ; *Nielsen Andersen & Co.* v. *Collins*, [1928] A.C. 34 ; *Belfour* v. *Mace*, (1928) 133 L.T. 338.

[4] As to this case, see Lord Dunedin's remarks in *N. Andersen & Co.* v. *Collins* : "The case of *Erichsen* v. *Last* is not *per se* binding on this house, but it is practically so ; for not only was it approved by Lord Herschell in *Grainger's* case, but in the subsequent and recent case of *Maclaine & Co.* v. *Eccot*, [1926] A.C. 424, both the Lord Chancellor, in whose judgment Lord Atkinson and Lord Sumner concurred ; and Lord Shaw explicitly adopted *Erichsen* v. *Last* as good law."—13 Tax Cas. p. 164 ; [1928] A.C. 34.

It must be emphasized that the element of continuity is essential —the non-resident must habitually sell goods or render services for profit in this country under contracts made here. It is, of course, possible for a trade to be carried on here by a foreign corporation even though contracts are made abroad, as when a manufactory or branch office is opened in this country.[1] Where all that is done by the agents in this country is the soliciting, receipt and transmission to their foreign principals of orders, the contracts being made abroad, then such principals are not carrying on a trade here.[2]

(ii) *American Law.*—For the purposes of Federal Income Tax, a foreign corporation engaged in trade or business within the United States or having an office or place of business therein is chargeable upon its net income from sources within the United States at a special rate.[3] The expression " engaged in trade or business " is nowhere defined either in the Revenue Act, 1936, or in the Treasury Regulations interpreting the Act, save that these exclude from the expression " the effecting of transactions in the United States in stocks, shares or commodities through a resident broker, commission agent or custodian "[4]; the term " office or place of business " is one to be interpreted according to the facts of each particular case, but " it implies a place for the regular transaction of business, and does not include a place where casual or incidental transactions might be, or are, effected."[5]

It seems strange that what constitutes " engaging in trade or business " has been defined neither in the Regulations nor in decisions of the courts ; the Chief Counsel for the Bureau of Internal

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[1] Thus Scrutton L.J. in *Belfour* v. *Mace*, 13 Tax Cas. 537, 558 ; (1928) 138 L.T. 338, *viz* : " In my view . . . if you find a series of contracts made in England it will be very difficult to escape liability for a trade exercised in England. . . . But it does not follow, in my view, that if you find a contract made abroad, there is necessarily no trade exercised in England. You may have, as the subject-matter of the contract, work to be carried out in England by the foreign manufacturer, and the foreign manufacturer may carry out all the work in England and receive payment in England, and under these circumstances, in my view, it will not necessarily follow that because a contract is made abroad the foreign merchant is not exercising a trade in England."

[2] *Grainger & Son* v. *Gough*, [1896] A.C. 325, 336 ; *Greenwood* v. *Smidth & Co.*, [1922] 1 A.C. 477.

[3] S. 231 (*b*) Revenue Act, 1936. Treasury Regulations 94 of 1936, Art. 231–1*b*. By a strange misnomer, such a corporation is also termed " a resident foreign corporation," Art. 1001–8.

[4] *Ibid.*, p. 398.

[5] *Ibid.*, p. 398.

Revenue has, however, held that the test of liability of foreign corporations to the "capital stock tax act" should also be applied to their liability to Federal Income Tax[1]—no doubt the courts would give full weight, as is their practice, to this departmental construction (*vide Bowring* v. *Bowers*)[2]; the liability of a foreign corporation for capital stock purposes is based upon "carrying on or doing business," in the United States.[3]

The Treasury Regulations applicable to the capital stock tax lay it down that the term "business" embraces whatever occupies the time, attention or labour of men for profit,[4] and that "doing business" includes any activities of a corporation, including the leasing or managing of properties, collecting rents or royalties,[5] but excluding the mere receipt of rent from the ownership of property; the question whether the foreign corporation is or is not carrying on business is one depending upon the particular facts of each case.[6] Since these Regulations have been drawn up by reference to the decisions of the courts, it is opportune to consider some of the more important and to compare them with similar English decisions.

In *Flint* v. *Stone Tracey & Co.*, which arose under an Act[7] imposing a corporation excise tax "upon the carrying on or doing business," it was held that a company whose activities consisted of managing real estate and renting offices was "doing or engaging in business"[8]; similarly a corporation organized to purchase, hold, lease and sell real estate was held to be doing business when it acquired coal land in exchange for stock and bonds and leased the land to another corporation.[9] In both these cases the foreign companies did something more than merely passively receive the rents of their properties and leases, and such an active business has always been held in this country to constitute carrying on business.[1]

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[1] G.C.M.17014 (C.B. XV–2, 317 (1936)).—"The test of liability for income tax, excess profits tax, and capital stock tax, in so far as such taxes were based upon, or measured by, engaging in or doing business within the United States, should be identical."

The writer gratefully acknowledges his indebtedness to the Commissioner of Internal Revenue, Treasury Department, Washington, for much of the information in this subsection.

[2] "In such circumstances, the departmental construction, except where the text of the Statute furnishes cogent reasons to the contrary to depart from it, must be adopted by the courts."—Augustus C. Hand J., 24 Fed. (2*d*) 918 (1928).

[3] Revenue Act, 1935, s. 105 (*b*).

[4] Treasury Regulations 64, Art. 42.

[5] *Ibid.*, Art. 43 (3).

[6] *Ibid.*, Art. 62.

[7] 36 Stat. 11 (5/8/1909).

[8] "We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits or leasing ore lands and collecting royalties, managing wharves, dividing profits and in some cases investing the surplus, are engaged in business within the meaning of this statutes and in the capacity necessary to make such organizations subject to the law."—220 U.S. 107.

[9] *Morrisdale Land Co.* v. *U.S.*, 66 Ct. Clms. 701.

The Supreme Court, however, in *McCoach* v. *Minehill Railway Co.*, held that a railway company which leased its entire railway to another company for a term of years at an annual rent was not "engaged in business," a term which the court said could not extend to "the mere receipt of income from property, and the payment of organization and administration expenses incidental to the receipt and distribution thereof."[2] It is very interesting to contrast this case with a decision to the direct contrary by the House of Lords in a case—*Inland Revenue* v. *South Behar Railway Co. Ltd.*[3]—where the facts were almost identical. In this latter case the company relinquished possession of the railway to the Secretary of State for India and received therefor a fixed annuity, its only other income being small dividends from Government stock and bank interest. It was held by the House of Lords that this company, whose position was almost identical with that of *The Minehill Railway Co.*, was carrying on a business and was therefore assessable to Corporation Profits Tax. Lord Sumner said:

> . . . the operation of receiving and thus discharging the annuity payments goes on continuously; and however simple, it is not a mere passive acquiescence. It is the transaction of business between debtor and creditor, resulting periodically in the discharge of a debt . . . there is here, therefore, that "repetition of acts," which Brett L.J. says (15 Ch.D. at p. 277) is implied in "carrying on business" . . . there would seem to be a presumption that a company continues to carry on business as long as it is engaged in collecting debts periodically falling due to it in the course of its former business.[4]

In *Stafford Owners, Inc.*, v. *U.S.*,[5] the Federal Court held that, where a corporation's activities were confined to the single purpose of purchasing and owning an apartment house for the benefit of its stockholders so that they might own their apartments, it was not doing business. There seem here to have been no transactions involving the relation of debtor and creditor, so that in English law, too, a similar corporation would probably be held "not to be engaged in business." It should, however, be noted that the "mere receipt of income from property, and the payment of organization and administration expenses incidental to the receipt and distribution thereof," which in the United States has been held[1] not to amount to "carrying on business," would, in England, attract liability to taxes such as Excess Profits Tax[2] or the Corporation Profits Tax,[3] which imposed a tax on the profits *inter alios* of all companies carrying on a trade or business. In *Inland Revenue* v. *The Birmingham Theatre Royal Estate Co. Ltd.*,[4] it was held that a company whose sole income was derived from leasing a theatre and other real estate, was carrying on a trade or business so as to be liable to Excess Profits Duty. In *Inland Revenue* v. *Westleigh Estates Ltd.*[5] the Court of Appeal held that a company formed to acquire certain real estate belonging to twenty-five persons entitled to it under two wills was carrying on a business so as to be liable to Corporation Profits Tax, although its sole income was from rents payable under leases. The difference in opinion of the courts of these two common-law countries is certainly very striking.

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[1] See explanation of Rowlatt J. in *Inland Revenue* v. *Dale S.S. Co.* (12 Tax Cas., p. 718), where he explains what he meant by an "active company" in his overruled judgment in *Inland Revenue* v. *Korean Syndicate Ltd.*, [1920] 1 K.B. 598, reversed [1921] 3 K.B. 258 (C.A.).

[2] "The distinction is between (*a*) the receipt of income from outside property or investments by a company which is otherwise engaged in business; in which event the investment income may be added to the business income in order to arrive at the measure of the tax; and (*b*) the receipt of income from property or investments by a company that is not engaged in business except the business of owning the property, maintaining the investments, collecting the income and dividing it among the stockholders. In the former case the tax is payable; in the latter not." —228 U.S. 295.

[3] [1925] A.C. 476.

[4] *Ibid.*, and 12 Tax Cas., pp. 711–12.

[5] Ct. Clms., 39 Fed. (2*d*) 743.

(B) **Jurisdiction:** (i) *English Law.*—A foreign corporation which carries on business in this country, for a not unsubstantial period of time at a fixed place, becomes, either because it is "resident" [*sic*] or "found" here, amenable to the jurisdiction of the courts of this country[6]; it is strange how few of the not very numerous cases on this topic have turned upon the meaning of the expression "carrying on business." Decisions of the Court of Appeal just before the Great War, followed in a very recent case—*The Lalandia*[7]—have made it clear that, just as for income tax,[8] the test is whether contracts are made in this country on behalf of the foreign corporation; unlike income tax, however, it is immaterial whether these contracts relate to the raising of capital or to ordinary revenue trade activities. Consideration will only be given to those cases where the point in issue was whether the foreign corporation was "carrying on business" here, the other two elements, the fixity of the place of business and representation by a "head-officer" not being material to the topic under consideration.

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[1] *McCoach* v. *Minehill Rly. Co.*, 228 U.S. 295.

[2] Finance (No. 2) Act, 1915.

[3] Finance Act, 1920, Part V.

[4] 12 Tax Cas. 580 (1923).

[5] [1924] 1 K.B. 390.

[6] See cases referred to *infra*.

[7] [1933] P. 56.

[8] See (A), (i), p. 186 *supra*.

La Bourgogne[1] is of interest, although the point was not in issue in this case; the defendants were a French shipping company which leased an office in London where it had an agent, paid by commission, who made binding contracts for the company, himself paid certain expenses of running the office, where he also carried on his own business. It was argued that the company was not itself carrying on business in this country, but this plea was rejected in all the courts; it was admitted in evidence that the French company was assessed to British Income Tax in the name of its agent, as a non-resident person exercising a trade in this country. In *Dunlop Pneumatic Co. Ltd.* v. *Actien Cudell & Co.*[2] a foreign corporation hired a stand at a motor show here for a period of nine days and had a representative there who took orders and entered into binding contracts; the "carrying on of business" was never disputed, the point at issue being whether the foreign company was here long enough to be held "resident" in this country. In *Dampskip Hercules* v. *Grand Trunk Pacific Railway Co.*,[3] it was held that the raising of loan capital in this country by a London Committee and the remittance of the proceeds to Canada was "carrying on business"; *Badcock* v. *Cumberland Gap Co.*[4] a somewhat similar case where the opposite conclusion had been come to, was distinguished on the ground that, there, "no contracts for borrowing had been made here."

We now come to the group of Court of Appeal decisions referred to above; in *Saccharin Corporation Ltd.* v. *Chemische Fabrik von Heyden &c.*[5] the defendants were a foreign corporation who employed a sole agent in London; this agent rented an office, was paid a commission on orders obtained by him and had authority to enter into contracts without submitting them to his foreign principal. The plaintiffs relied, *inter alia*, on *Grainger & Son* v. *Gough*[6] and other income-tax cases referred to previously, while the defence argued these cases furnished no analogy—it was held that the foreign corporation was carrying on business here. In *Okura & Co. Ltd.* v. *Forsbacka Jernverks &c.*,[7] the facts were the same except that the agent had no authority to bind his foreign principal, so that all orders had to be submitted abroad for approval, the contracts being made there; it was argued that "it is immaterial that the defendants have no general authority to conclude contracts—the question is, do the total operations performed by the agents constitute carrying on business by the defendants in London?"[1] It was held that, as the agents were not competent to bind their principal, the foreign corporation could not be regarded as "carrying on business" here.

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[1] [1899] P. 1; [1899] A.C. 431.

[2] [1902] 1 K.B. 342.

[3] [1912] 1 K.B. 222.

[4] [1893] 1 Ch. 362.

[5] [1911] 2 K.B. 516.

[6] [1896] A.C. 325; see pp. 185, 186 *supra*.

[7] [1914] 1 K.B. 715.

In *Thames & Mersey Marine Insurance Co.* v. *Societa di Navigazione &c.*[2] the defendants were a foreign steamship company who employed general agents here who had authority to enter into binding contracts and who allotted a fixed space in their office where their foreign principal's work was done; it was held that they were carrying on business here. The judgment of Lord Wrenbury, then Buckley L.J., is important enough to quote in full, since it represents the developed common law of England on this subject:

> If contracts are habitually made for a reasonably substantial period of time at a fixed place of business within the jurisdiction by a firm or person without referring each time to the foreign corporation for instructions—then the foreign corporation is carrying on business in that place . . . the difficult question in all cases was to say whether the foreign corporation was carrying on business here or not. . . . The test in each case was . . . did the agent in carrying on the company's work make a contract for the foreign corporation, or did the agent, in carrying on the agent's own business, sell a contract with the foreign corporation? In the former case, the foreign corporation was, and in the latter case it was not, carrying on business at that place. M. Samuel & Co. [the agents in this case.—A. F.] did the former; Thos. Cook & Son did the latter.[3]

The opening words of Lord Wrenbury's judgment are very reminiscent of those of Brett L.J. in *Erichsen* v. *Last*, a case which has received the repeated approval of the House of Lords,[4] *viz.* ". . . whenever profitable contracts are habitually made in England, by or for foreigners, with persons in England . . . such foreigners are exercising a profitable trade in England. . . ."[5] In *The Lalandia*,[6] decided a few years ago, Lord Wrenbury's remarks were quoted with every mark of approval and employed to determine the issue.

(ii) *American Law.*—In America it is an essential element of the jurisdiction of the courts over foreign corporations that the corporation should be actually "doing business" in the State[1]; jurisdiction cannot be got merely because an officer of a foreign corporation doing no business in a State was found there and served with a writ.[2] In contrast to English law, the wealth of case law in America can truly be described as superabundant—Beale in his *Conflict of Laws* (ed. 3, 1935) devotes no fewer than thirty pages to an analysis of "what constitutes doing business." He lays it down that the problem is one of fact, and that no principle of law can be deduced from the very many conflicting decisions of the courts[3]; we may contrast the typically simple rule of English law which has for the purposes, both of taxation and of amenability to the jurisdiction, laid down the place of contract as the test. The difficulty in America may be due to the devouring appetite of the courts of the various States, who have employed every pretext to assume jurisdiction over foreign corporations and also to the differing standards employed to determine what constitutes "doing business," which have varied according to the subject-matter before the courts.[4]

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[1] Shearman K.C. for the defence; *ibid.*, p. 718.

[2] (1914) 111 L.T. (C.A.) 97; 30 T.L.R. 474.

[3] 30 T.L.R. at p. 475.

[4] See note 4, p. 186 *supra.*

[5] (1881) 8 Q.B.D. 414.

[6] [1933] P. 56; 102 L.J.P. at p. 16.

Doing a single and isolated act is not "carrying on business" within the meaning of the statutes relating to service of process on foreign corporations; some continuous prosecution of business must at least be contemplated, although liability in such a case arises as soon as a single act is performed.[1] Continuous business action is a requisite, but it appears that the mere contemplation of activities is sufficient provided that there has been one act of business.[2] It would seem that binding contracts need not be made on behalf of the foreign corporation to ensure liability to the jurisdiction—it is sufficient if its representatives merely solicit orders[3]; an interesting example is *St. Louis S. W. Railway* v. *Alexander*,[4] where a foreign fire insurance company sent its adjusters into a State to agree the amount of the loss claims as regards policies issued there—this was held to be carrying on business in the State, as also was the mere receipt of payments on behalf of the foreign company.[5]

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[1] "The jurisdiction taken of foreign corporations in the absence of statutory requirements or express consent does not rest on a fiction of constructive presence like '*qui facit per alium facit per se.*' It flows from the fact that the corporation itself does business in such a way and to such an extent that its actual presence is there established." *Bank of America* v. *Whitney, C.N.B.* 261 U.S. 171; 67 L. ed. 594, 596 (1923); see also *Rosenberg Bros.* v. *Curtis Brown*, 260 U.S. 516 (1923) and *Louisville & N.R.R. Co.* v. *Chatters*, 270 U.S. 125 (1929).

[2] *St. Clair* v. *Cox*, 106 U.S. 350 (1882); *Bank of America* v. *Whitney, C.N.B.* 261 U.S. 171 (1923); *cf.* similar law in England, *vide Littauer Glove Corporation* v. *F. W. Millington* (1920) *Ltd.*, (1928) 44 T.L.R. 746.

[3] See Beale, s. 179, 4–24; II, pp. 828–61; "The decision of any case is therefore authority for another only in a very general sense, and one will not be surprised to find that . . . cases apparently indistinguishable on the facts are differently decided. . . ." II, p. 828.

[4] The following quotation from a learned article by Mr. Isaacs, *An Analysis of "Doing Business*," 25 *Columbia Law Review*, 1018, 1024 (1925), is interesting, *viz*: "The least degree (of doing business) is that which will permit service of process in a suit against a foreign corporation. For this, the business done must be of such a character as to warrant the inference that the corporation is present in the jurisdiction where service is attempted. A higher degree is necessary to subject such a corporation to a tax on its activity, namely continued efforts in pursuit of profit and gain and such activities as are essential to those purposes. A still higher degree is the standard for the application of statutes requiring qualification in the State, as where the activities of the corporation indicate a purpose to regularly transact business."

See also *Hartstein* v. *Seidenbachs*, 222 N.Y.S. 404 (1927), *cit.* Beale II, p. 829, *viz*: "A lesser degree of business activity is required to authorize service than in other cases, *i.e.* the necessity of a licence under the licensing statutes and the liability to tax on corporate activities."

It has also been held that the keeping of a foreign corporation's stock transfer books in a State,[6] or the countersigning of stock certificates by the secretary of a foreign company, who lived in another State,[7] was equivalent to "carrying on business" in such State. It is interesting to compare the decisions in these last two cases with the English case of *Badcock* v. *Cumberland Gap Co.*[8]; this latter company was incorporated in the United States, where its directors and officers were—there was a London agent, and as the majority of the shareholders lived in this country the transfer books were kept here and the agent forwarded transfers to America for signature and received money here for calls, but no actual business, in the ordinary sense of the term, was carried on here. It was held in the Chancery Division that the company was not carrying on business here, but there seems little doubt but that the courts in America, even the Supreme Court, would have reached a contrary decision.

In America, as in England, a foreign corporation can carry on business through an agent, but it would seem that the power of the agent to make binding contracts for his foreign principal is not essential if he is permanently established in the State[9]; *Connecticut*

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[1] Beale, s. 179, 5; and *Richmond S.A. Co.* v. *E. W. Minter & Co.*, 300 S.W. 574 (1927).

[2] Beale, s. 179, 10; and *J. D. Plow & Co.* v. *Wyland*, 76 P. 863 (1904).

[3] Beale II, p. 835.

[4] 227 U.S. 218; 57 L. Ed. 486 (1913).

[5] *International Harvester Co.* v. *Kentucky*, 234 U.S. 579; 58 L. ed. 1479 (1914).

[6] *Pomeroy* v. *Hocking Valley Rly.*, 218 N.T. 530 (1916).

[7] *International Moving Picture & Film Co.* v. *Smith*, 99 S. 303 (1924).

[8] [1893] 1 Ch. 362; 62 L.J. Ch. 247.

[9] Beale II, pp. 836–7; see to the contrary s. 179, 16, as regards agents who merely transmit orders to the foreign corporation.

M.L. Insurance Co. v. *Spratley* [1] is an extraordinary decision, since it held that a foreign corporation, which had once made contracts of insurance in a State, but had since withdrawn entirely from the State, was still doing business in the State so long as any policy holder who had procured his policy from the agent in the State continued to hold it.

One could go on enumerating indefinitely the many and varied decisions of the courts in America on this topic, but as Beale truly says, it is impossible to deduce any logical principle from them ; it seems that if activities of any nature are done on behalf of the foreign corporation, they will be held to constitute "doing business" so long as they are not purely isolated acts. The following instances will bear this out, *viz.* the continuous sending by a foreign company of its employees into a State to supervise and control the business of a local subsidiary corporation,[2] the soliciting of loans,[3] or of orders if there is any element of business besides the mere solicitation.[4]

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[1] 172 U.S. 602 ; 43 L. ed. 569 (1898) ; *cit.* Beale, II, p. 839.

[2] *Ruff* v. *Manhattan Oil Co.*, 216 N.W. 331 (1927).

[3] *Chattanooga N.B. & L. Asscn.* v. *Dawson*, 189 U.S. 408 ; 47 L. ed. 870 (1903).

[4] Beale, II, pp. 849–50.

THE CAPACITY OF MARRIED WOMEN IN FRENCH LAW.

[*Contributed by* M. F. P. HERCHENRODER, ESQ., *Docteur en Droit* (*Paris*).]

The Civil Code.—Cambacérès' first draft of a Civil Code for the whole of France (1793) had proposed that the marital power should be abolished, and that married women should be invested with civil capacity. It was, however, only under the Consulate that the Code definitely took shape, and the reaction which had then set in against the unbridled licence of the Directory left its decisive imprint on the department of family law, and in particular on Book I, Title V, Chapter VI, where the respective rights and duties of husband and wife were set forth. Reversing here the engines, the authors of the Code reaffirmed the supremacy of the husband by enjoining obedience on the wife as the counterpart of his protection, and declared that she should be bound to live with him and to follow him wherever he might judge it proper to reside.[1] As a corollary they maintained the incapacity of the wife, and provided that she should be unable to appear in judicial proceedings, whether as plaintiff or as defendant, without the authority of her husband,[2] and that she should be incompetent to give, alienate, mortgage or acquire property, either by gift or purchase, unless he joined in the instrument or gave his consent in writing.[3] In short, the Code placed married women on no higher plane than minors and lunatics.[4] In one field only did it recognize their capacity: they needed no authority to make a will.[5]

It was not open to the parties to curtail the rights of the husband over the person of the wife by any stipulation of their ante-nuptial contract (*contrat de mariage*),[6] nor was it possible to relax the wife's incapacity by a general authority granted by her husband, except as regards the administration by her of her property: his consent was required for each specific act.[7] If he refused or was unable to give it, the only remedy of the wife lay in an application to the court for the requisite authority.[8]

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[1] Arts. 213, 214.

[2] Art. 215. Art. 216 dispensed with the husband's authority if the wife was prosecuted on a criminal charge.

[3] Art. 217. It should be observed that the concurrence of the husband was necessary although the wife was not married under the community system or was separated as to property. Under Art. 1449 a wife separated as to property "may dispose of and sell her personalty," but the tendency was to interpret this power of disposition as being restricted to acts of management.

[4] Art. 1124.

[5] Arts. 226, 905.

[6] Art. 1388.

[7] Art. 223.

[8] Arts. 218, 219, 221, 222, 224.

In course of time the position of married women in French law became an intolerable anachronism. The rules of the Code rested on assumptions no longer defensible,[1] and in practice they not infrequently gave rise to inconvenience and even hardship.[2] No serious reform, however, was attempted for over a century. The reason for this must be sought in the conservative attitude of the French people towards the family, and in the palliative afforded by the legal fiction of the wife's domestic agency (*mandat domestique*) in virtue of which a married woman was considered to have her husband's implied authority to pledge his credit for household wants: she could thus purchase goods and provisions, engage servants, etc., without any express authority.[3]

In the last quarter of the nineteenth century inroads were made on the rigid system of the Code, but they were tentative in character and did not even approach the core of the matter. On the establishment of a Post Office Savings Bank (*caisse d'épargne postale*) in 1881, it was provided that married women might open and operate an account at the Bank independently of their husband,[1] and they were granted similar powers in relation to the Old Age Pension Fund (*caisse nationale des retraites pour la vieillesse*) on its creation in 1886.[2] Lastly, it was ordained in 1893 that a judicial separation (*séparation de corps*) should have for effect to restore to the wife the full exercise of her civil capacity.[3]

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[1] It is not easy to ascertain the exact considerations by which the authors of the Code were swayed in placing married women under such disabilities. The First Consul himself was no believer in the cause of woman's emancipation. "La nature a fait des femmes nos esclaves," he is reported to have said (Thibaudeau, *Mémoires sur le Consulat*, p. 426), and it was largely at his prompting that the marital power was reinstated. But the system built up by the authors of the Code betrays some confusion of thought. They were influenced, no doubt, by recollections of the Roman law, in which the marital power had been at one time as absolute as the *patria potestas*, and of the customary law of the Germanic tribes which had subjected women to a guardianship of military origin. The Roman dotal system, in force in the south, and the *Senatus Consultum Velleianum* also exerted their influence: the latter had been abrogated by Henry IV's Edict of August 1606, but at the outbreak of the Revolution advantage was still taken of it in certain parts of the country. It should be observed, however, that the Code weighed heavily, not on women generally, but on those that were married. Its authors, therefore, can hardly have been impelled by a belief in the alleged *fragilitas sexus*, applicable to single and married women alike, although evidence of such a belief may be discerned here and there, *e.g.* in the rule (now repealed) under which women were debarred from being witnesses to civil status records and notarial deeds. *Cf.* Art. 381 (repealed by the law of February 18, 1938) and Art. 391. *Cf.* also Art. 113 of the Commercial Code (repealed by the law of February 8, 1922). That apart, the *feme sole* laboured under no disabilities. It is likely, therefore, that the importance of laying firmly the foundations of the family rather than any distrust inspired by woman's frailty led the authors of the Code to affirm the supremacy of the husband (*Cf.* M. René Renoult's report, *Journal Officiel, Documents Parlementaires, Sénat, Annexe* 404, 1933).

[2] Reference was made in the Senate to the case of a married man who perversely insisted on his wife and children residing with him in Senegal. The wife's only escape from this predicament, it appears, was a divorce. (*Journal Officiel, Débats Parlementaires*, March 20, 1937, p. 348.) In regard to their incapacity it should be noted that married women were not only debarred from performing juridical acts without their husband's concurrence, but in practice the disability extended to acts not strictly juridical in character, such as sitting for an examination or applying for a passport. In case of the husband's refusal, recourse to the court necessarily involved delay in cases in which dispatch might be essential.

[3] *Cf.* the presumption of authority in English law in regard to necessaries.

Law of July 13, 1907.—More momentous was the step taken in the law of July 13, 1907, which gave married women extensive powers over the earnings of their own work and the savings therefrom.[4] They were thus enabled not only to manage this property (known as *biens réservés*) but to invest and transfer it without interference on the part of their husband. His authority was required only if the transfer was made without consideration, but even this restriction was partly removed after the Great War, and married women over forty-five years of age were empowered to dispose freely of such property for the benefit of certain charities, provided they had no children or other descendants living.

To prevent any misuse by the wife of these powers it was enacted that they might be withdrawn by the court, in whole or in part, on the husband's application.[5]

Apart from this partial relaxation of the wife's incapacity, provision was made in the 1907 law to ensure that husband and wife should share the household expenses in accordance with their respective means. In default of voluntary contribution by either party, the other could apply to the *juge de paix*—an expeditious and inexpensive jurisdiction—for an order enabling him or her to attach and receive a fair share of the defaulter's salary or earnings.

This part of the law worked more satisfactorily in practice than the other provisions, because the special capacity which these had conferred on married women was overshadowed by the general incapacity predicated by the Civil Code. Any departure from the general rule had to be brought within the purview of the exception, and bankers, brokers and other persons with whom a married woman sought to transact business were apt to insist on her husband's authority or on strict proof that the property affected by the proposed transaction was "reserved property" within the meaning of the 1907 law: the exaction of such proof, however, usually led to the interference or intervention of the husband, and the object of the law was thus defeated.

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[1] Law of April 9, 1881. *Cf.* Art. 16 of the law of July 20, 1895, for the procedure in case of opposition by the husband.

[2] Law of July 20, 1886.

[3] Law of February 6, 1893. *Cf.* the change made in England by ss. 21, 25 of the Matrimonial Causes Act, 1857.

[4] Irrespective of the system governing the relations of the parties in regard to property, and notwithstanding any clause in their ante-nuptial contract to the contrary. It should be observed that the powers conferred do not extend to earnings from work done jointly by husband and wife. The reform bears some analogy to that effected in England by the Married Women's Property Act, 1870.

[5] It may be added that under Art. 3 "reserved property" may be taken in execution not only by the wife's creditors but by those of her husband, if they have contracted with him in the interest of the household and if under the system adopted by the parties on their marriage and apart from the provisions of the 1907 law this property would have come to the husband's hands.

Law of February 18, 1938.—Although one of the consequences of the Great War was to turn public attention to reform in fields where it was overdue, nothing was done until December 1925 to bring the French law relating to married women into harmony with the ideas and needs of the times. A strong committee was then set up by the Minister of Justice and entrusted with the task of overhauling the relevant articles of the Civil Code. In June 1932, a Bill, the outcome of the committee's labours, was introduced by the Government in the Senate: it dealt not only with the topic of married women's capacity but also with the cognate subject of *régimes matrimoniaux*.[1] The Upper House, however, split up the Bill; consideration of the latter topic, an admittedly intricate and delicate matter, was postponed: the remainder of the Bill, after being amended on certain points, has now become the law of February 18, 1938.

Book I, Title V, Chapter VI, of the Civil Code is radically modified by this law, the express object of which is the abrogation of the marital power and the grant of civil capacity to married women. Art. 212, under which husband and wife owe each other fidelity, support and assistance, is maintained; but Arts. 213 and 214, upon which the marital power was founded, have been recast in their entirety and the obligation of obedience abolished. Under Art. 213 (amended) the husband, as head of the family,[2] has the choice of the common residence: the wife is bound to live with him, and he to receive her. Should the husband abuse his rights under the article, the wife is given a right of recourse to the court, and the dispute is decided in chambers after the husband has been summoned and the Public Prosecutor (*Ministère Public*) has been heard. Accordingly, the duty of the wife to follow her husband is no longer unqualified.

The status of head of the family is lost by the husband in case of absence, interdiction, inability to express his will or judicial separation. It is similarly lost on conviction for a crime,[3] even if the judgment is by default, until the sentence has been purged.

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[1] *I.e.* the various systems by which the rights of husband and wife over each other's property may be regulated.

[2] The expression originated in the "*capo di famiglia*" of the Italian Civil Code. It did not occur in the original Bill, but an amendment was carried in the Senate providing that "the husband should be the head of the family." It was feared, however, that a definite statement of this kind might be construed as a reaffirmation of the marital power which it was one of the objects of the measure to destroy. In order to tone down the pronouncement, it was decided that the phrase "*chef de la famille*" should appear, not as the predicate in an independent sentence, but in apposition to the words "*le mari*" and as a mere explanation of the powers conferred on the husband. The value of a grammatical quibble in a legislative measure is open to question.

[3] In the French sense of the term. The French Penal Code divides criminal offences into three categories: *crimes* (roughly equivalent to felonies), *délits* (misdemeanours) and *contraventions* (petty breaches of the law and police regulations).

The new Art. 214 combines part of the old Art. 214 with certain of the provisions of the 1907 law. It enacts that the husband shall be bound to furnish his wife with the necessaries of life according to his means and station. This is a very useful disposition, since it is the foundation of the fiction regarding the wife's domestic agency. On the other hand, the wife must, out of the property under her control, contribute to the household expenses and the cost of educating the children born of the marriage, in proportion to her means and those of her husband.[1] If either party fails to discharge his obligation in this respect, the other is empowered to apply to the *juge de paix* for an order enabling him or her to attach and receive a fair share of the defendant's wages, earnings or income. For this purpose the procedure is simplified, and the parties are summoned before the court by a mere registered letter sent through the post by the registrar explaining the nature of the claim. In order to attach property under these provisions, all that is necessary is that the successful party should serve the judgment on the other party and the persons in whose hands the property is to be attached. It is ordained that a judgment delivered under this article should be provisionally capable of execution, notwithstanding any opposition or appeal. But application may be made for a fresh decision if a change in the respective circumstances of the parties justifies it.

In addition to this the law of February 18, 1938, makes fundamental alterations in Arts. 215 to 225 of the Code, where the rules concerning the incapacity of married women were set forth. They are repealed and replaced by two Articles—215 and 216—which embody the opposite principle of the wife's capacity.

Under Art. 215 every married woman has the full exercise of her civil capacity : the exercise of her capacity can be restricted only by statutory limitations or the *régime* adopted by her on marriage.

Art. 216 deals with the vexed question of the right of a married woman to follow a profession apart from her husband. Under the old law she was not entitled to do so without his consent. Moreover, if she intended going into business, the general principle of the Civil Code was reinforced by Art. 4 of the Commercial Code, under which a married woman cannot become a public trader without her husband's consent. The present provisions of the law are in substance as follows : Art. 4 of the Commercial Code remains in force : accordingly, a married woman may not engage in trade without her husband's consent, notwithstanding the general capacity with which she is invested by Art. 215 (as amended) of the Civil Code. The husband's consent, as heretofore, may be implied. With respect to other professions, her choice is *prima facie* absolute,[2] but it is open to her husband to raise an objection, in which case she is empowered to bring the dispute before the court for decision. If the husband's objection does not appear founded, having regard to the interests of the household or of the family, the court, after hearing the parties and the Public Prosecutor in chambers, may authorize the wife to disregard the opposition.[1]

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[1] The article expressly maintains the dispositions of Arts. 1537 and 1575 under which the extent of the wife's contribution under the system of separation of property and the dotal system is fixed at one-third of her income.

[2] The reason for the differentiation between trading and other callings is that under Art. 5 of the Commercial Code (a repetition of Art. 220 (now repealed) of the Civil Code), married women in business bind their husband if there is community

It would be unreasonable, perhaps, to expect that Art. 216 will engender no difficulties in practice. Thus, the plain intention of the Legislature was that the only bar to the free choice of a profession by a married woman should be the paramount interests of the household or of the family, but wide divergences of opinion may arise in a rapidly changing world as to what is or is not likely to imperil those interests. There is consequently a danger of the law in this respect varying with the length of the judge's foot. On the other hand, the article does not expressly restrict the husband's right of opposition to cases where the wife is taking up a new pursuit, although the Legislature intended this restriction. The only dowry of many a girl nowadays is the profession for which she has been trained, and it would be manifestly unfair here to allow an opposition by the husband. The same considerations apply where the wife has entered on a profession with her husband's express or implied consent, and he tries to go back on his consent. It is to be regretted that the article failed to make it clear that there is no right of opposition in such cases. The article, however, provides that the right cannot be exercised by a husband who has lost his status as head of the family.

A valid opposition by the husband avoids the professional engagements entered into by the wife, and it was apparently intended that they should be void *ab initio*. In practice this disposition may well have for effect to restrict the wife's freedom to take up a profession in view of the natural reluctance of third parties to transact business with a married woman in her professional capacity without some preliminary assurance as to her husband's attitude.

A nice point of construction may arise out of Art. 216 in relation to married women desirous of carrying on a trade. As stated above, the consent of the husband is still a condition precedent in that case. It was widely held formerly that the husband's refusal clinched the matter and that it was not lawful for the court to authorize the wife to trade. It

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of goods (*communauté*) between them. This being the rule, it would have been unfair if the husband had had no say in the matter. The explanation of Art. 5 is to be found in the fact that the community system is still the law of France in the absence of a special ante-nuptial contract (which must be drawn up by a notary). Under that system married women have no control, as a rule, over property of any importance. Were they not empowered, when carrying on a trade, to bind their husband and the community property, they would obtain no credit and could not continue in business.

[1] A married woman making an application under either Art. 213 (dispute about the place of residence) or Art. 216 (dispute about the choice of a profession) is entitled to free legal aid.

may, however, be argued that as capacity is now the rule, a right of recourse would be more in consonance with the spirit of the law.

The law of February 18, 1938, makes a number of consequential amendments in other parts of the Code,[1] *e.g.* it removes married women from the list of incapable persons in Art. 1124, but it leaves untouched Book III, Title V, which deals with the topic of *régimes matrimoniaux.* Accordingly, while the changes wrought by the law mark an important stage in the reform of the law governing husband and wife, their effect may not be far-reaching in practice. It must be borne in mind that under the community system—still the common law of France in the absence of a special contract—the wife seldom controls property of great value. Over the community property itself the powers of the husband as " lord and master " (*seigneur et maître de la communauté*) are tantamount to those of an absolute owner. Contracts entered into by the wife without his consent do not bind the community property unless she is engaged in trade with his consent and has contracted for the purposes of her business.[2] And even if she has separate property it is managed by her husband,[3] and the income derived from it belongs to the community.[4] Under the amended law the wife is theoretically entitled to dispose of the reversion (*nue-propriété*) in her separate property without interference on the part of her husband, but this right is likely to prove illusory in practice.

As regards married women separated as to property, they are expressly precluded from alienating realty without the consent of their husband or the authority of the court upon his refusal.[5] In respect of personalty, however, their powers which interpretation had restricted to acts of management are now absolute.

The position of married women subject to the dotal system in relation to paraphernal property, whether realty or personalty, is apparently unaffected: they cannot alienate it without the authority of their husband or that of the court.[6]

That these dispositions of the Civil Code stand in need of revision is admitted on all hands. They were framed in an age when wealth was still to a great extent synonymous with land. The law of February 18, 1938, will have for one of its effects to emphasize their obsolescence and illogicality. Thus, a married woman under the system of separation of property will still require her husband's consent to alienate a small plot of land, while she is now free to dispose of large blocks of shares held by her in opulent companies.

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[1] Arts. 236, 238, 311, 420, 776, 1096, 1124, 1125, 1304, 1312, 1940 are amended. Arts. 217, 218, 219, 220, 221, 222, 223, 224, 225, 241, 381, 399, 400, 905, 934, 1029, 1096 (par. 2) are repealed as well as Arts. 1 (par. 5), 2, 6, 7, 8, 9, 10 of the law of July 13, 1907. But, as stated in the text, some of the repealed provisions of the 1907 law are reproduced in the new Art. 214.

[2] Art. 1426.

[3] Art. 1428.

[4] Art. 1401(2)

[5] Arts. 1449, 1538. Oddly enough, married women separated as to property will not be able to dispose of their realty at all unless they have obtained their husband's authority or that of the court, whereas married women subject to the community system will presumably be free to dispose of the reversion in their separate realty.

[6] Art. 1576.

That apart, it may well be that pending a thorough reform of the topic of *régimes matrimoniaux* the main and only practical result of the 1938 law will be to infuse life into the law of July 13, 1907, and to give to married women something more than an academic right to dispose freely of their wages and earnings.[1] On the abrogation of the community system as the common law of France and the revision of Book III, Title V, but only then, the reform begun in the 1907 law and pursued in the 1938 law will be satisfactorily accomplished.[2]

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[1] Art. 2 of the law of July 13, 1907, has been repealed. It would appear, therefore, that the rights of the wife under that law cannot be withdrawn or curtailed by the court. *Cf.* the article in Dalloz, *Recueil Hebdomadaire*, 1938, p. 25, by Professor L. Julliot de la Morandière.

[2] One of the effects of the abrogation of the marital power will be to deprive the husband of his right of supervision over his wife's circle of acquaintances and her correspondence.

According to M. Delattre's report to the Chamber, a married woman may now join a university, appear at an examination, open an account at a bank, draw or receive a cheque, accept a succession, gift or legacy, act as assistant guardian (*subrogée tutrice*) or executrix, take out an insurance, sell or give property. Her powers of alienation, however, are restricted by the provisions of Book III, Title V, to which reference has been made in the text. The discordance between the express purpose of the 1938 law and the unamended articles of that section of the Code may well prove a prolific source of litigation.

THE CANADIAN EXPERIENCE AND THE TREATY-MAKING POWER IN THE GOVERNMENT OF INDIA ACT, 1935.

[*Contributed by* S. K. Das, Esq., M.A., LL.M.]

In the new Indian Constitution, the power of making treaties and entering into obligations with other countries is included in the Federal Legislative List, by virtue of s. 100(1), which refers to the Seventh Schedule of the Government of India Act, 1935. The subject is of considerable importance in view of the recent Privy Council decision [1] on appeal relating to the validity of the Weekly Rest in Industrial Undertakings Act, the Minimum Wages Act, 1935, and the Limitation of Hours Act, 1935, of the Parliament of Canada, which in substance gave effect to draft conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles, 1919, and ratified by the Government of Canada. The Government of India is an original signatory to the Treaty of Versailles just as the Dominions are, and it often enters into international conventions agreed upon at Geneva. It is easy to foresee a time when the Government of India will enter into treaties and conventions without any intervention of the British Government.

By s. 132 of the British North America Act, 1867, the Parliament and the Government of Canada have power to implement treaties between the Empire and such foreign countries. The question has been raised whether agreements between Governments are treaties in the sense of the above section. The Supreme Court of Canada was divided on this point [2]; Sir L. P. Duff C.J., Davis and Kerwin J.J. took the view that the agreements were treaties within the sense of s. 132, and if they are not within s. 132, they fall within the residuary power of s. 91. The reason they set forth was as follows: The conventions arose under the Treaty of Versailles. The Treaty of Versailles was a treaty between the British Empire and the foreign countries. *Prima facie*, therefore, s. 132 of the British North America Act included such a treaty. Then by Art. 405 of the said treaty, upon ratification of a convention notified to Canada, Canada incurred the obligation to take such action as may be necessary to make effective the provisions of the convention. The obligation to make effective the provisions of the convention was a treaty obligation, and, *prima facie*, therefore, an obligation in respect of which the Dominion Parliament was invested with the authority bestowed by s. 132. Then their lordships referred to the decisions of the Board in the *Aeronautics Case*,[1] and the *Radio Case*.[2] The language used by Lord Sankey in the *Aeronautics Case* was wide enough to justify the conclusion held by these judges of the Supreme Court that the power to legislate for the performance of international obligations reposed exclusively in the Dominion Parliament.

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[1] *A.-G. for Canada* v. *A.-G. for Ontario*, [1937] A.-C. 326.

[2] Reference re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act, (1936) 3 D.L.R. 673.

> Their Lordships are of opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piecemeal analysis. They consider the governing section to be s. 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries.[3]
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> With regard to some of them, no doubt, it would appear to be clear that the Dominion has power to legislate, for example, under s. 91(2), for the regulation of trade and commerce and under (5) for postal services, but it is not necessary for the Dominion to piece together its power under s. 91 in an endeavour to render them co-extensive with its duty under the Convention when s. 132 confers upon it full power to do all that is legislatively necessary for the purpose.[4]

Duff C.J.C., Davis and Kerwin J.J. interpreted the *Radio Case*[5] to mean that international obligations, which were strictly treaty obligations, within the scope of s. 132, as well as obligations under conventions between Governments not falling within s. 132, are matters which, as subjects of legislation, cannot fall within s. 92, and therefore must fall within s. 91; and since they do not fall within any of the enumerated subjects of s. 91, they are within the ambit of Dominion powers to make laws for the peace, order and good government of Canada. Then there was the obiter[6] of Lord Dunedin in the *Radio Case*—"In fine, though agreeing that the Convention was not such a treaty as defined in s. 132, their lordships think that it comes to the same thing." Here what their lordships had in mind was not the fact that the conventions were not treaties, but that the conventions were not treaties *between the British Empire and foreign countries*. In fact, their lordships were conceding that conventions could be regarded as treaties.

Rinfret, Cannon and Crockett J.J. took a different view of the matter. They held that by Art. 405 of the Treaty of Versailles, the member States only undertook to bring the recommendation or draft convention before the authority or authorities within whose competence the matter lay, for the enactment of legislation or other action. In 1925, answers had been given by the Supreme Court of Canada on a set of questions,[7] submitted to it, relating to the respective powers of the Parliament of Canada and of the provincial legislatures in respect of obligations arising under the provisions of the Labour Part (Part XIII) of the Treaty of Versailles. The court there held that the obligation was simply in the nature of an undertaking to bring the recommendations or draft conventions before the authority or authorities ; and the court recognized that the provincial legislatures were in part competent authorities for enforcing limitation of hours. Therefore in this case the same question was raised whether the provincial legislatures had any competence in these matters under discussion. Clearly these matters fell within s. 92. As regards the *Aeronautics* [1] and the *Radio* [2] cases, Rinfret, Cannon and Crockett J.J. took the view that these cases were clearly covered by s. 132 and s. 91 respectively. Their lordships of the Privy Council refrained from giving any opinion on the question whether international agreements were treaties, as they decided the case on other grounds.

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[1] [1932] A.C. 54.
[2] [1932] A.C. 304.
[3] [1932] A.C. 74.
[4] *Ibid*, 77.
[5] [1932] A.C. 304.
[6] [1932] A.C. 312.
[7] *In re* Legislative Jurisdiction over Hours of Labour, (1925) Can. S.C.R. 505.

Now if we turn to the Government of India Act, 1935, we shall find that the placitum No. 3 of the Federal Legislative List runs as follows : " External affairs, the implementing of treaties and agreements with other countries, extradition including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India." Apparently the inclusion of " agreement " has obviated one of the many difficulties faced in the construction of the British North America Act, 1867.

Another difficulty which faced the Supreme Court of Canada and the Privy Council was whether such International Labour Office Conventions were " treaties between the Empire and such foreign countries." The Supreme Court was again equally divided on this point, and the Privy Council took the view that these conventions were not such treaties within the meaning of the Act. Their lordships of the Privy Council interpreted s. 132 of the British North America Act, 1867, to apply to treaties made between the Empire and such foreign countries. The difficulty is historical. When the Constitution of Canada was drafted, it was not foreseen that Canada would emerge as a completely self-governing Dominion with power to enter into conventions with other countries as a separate unit and not as a part of the British Empire. Viscount Dunedin said in the *Radio Case*,[3] " the idea of Canada as a Dominion being bound by a convention, equivalent to a treaty, was quite unthought of in 1867. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132." Dr. Jennings [4] points out that if a very strict interpretation is put on s. 132, it now means nothing, " for no treaties are made on behalf of the empire as a whole." A progressive interpretation might have been given to this section ; for according to Lord Loreburn L.C. [5] :

> If the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. . . . For whatever belongs to

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[1] [1932] A.C. 74. [2] [1932] A.C. 304. [3] [1932] A.C., at p. 312.

[4] *Canadian Bar Review*, June, 1937, p. 461.

[5] *A.-G. for Ontario* v. *A.-G. for Canada*, [1912] A.C. 571, 583.

self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act.

Then the power must reside somewhere. As the power of entering into conventions does not belong to the provinces, it must belong to the Dominion. If the power of giving legislative effect to the conventions resides partially in the provinces, then clearly there is a field where treaty obligations cannot be carried into effect because the Dominion cannot compel the provinces to legislate. There is then a no-man's-land as regards conventions or treaties which neither the Dominion nor the provinces can effectively enter. Thus there is an object in the self-government which belongs neither to the Dominion nor to the provinces. Had Loreburn's dictum been adhered to, and had a progressive interpretation been given to the British North America Act, it could have been said that the treaties fell within s. 132. "The words 'between the British Empire and foreign countries' are ambiguous. They may mean the whole empire or they may mean part of it. If the former meaning is taken, a power belonging to self-government is not in the Act at all. On this argument, therefore, the latter must be the correct meaning."[1] Further, a progressive interpretation was given to the British North America Act by the Privy Council in *Henrietta Muir Edwards* v. *A.-G. for Canada*,[2] where it was held that in s. 24 of the British North America Act, 1867. "persons" included members of both sexes, and hence a woman could be called to the Senate. Now, nobody even thought in 1867 that a woman would sit in the Senate. Lord Sankey approved of a sentence from *Canadian Constitutional Studies*, by Sir Robert Borden, 1922, p. 55. "Like all written constitutions it has been subject to development through usage and convention."[3] A similar progressive interpretation could have been given to s. 132. Lord Atkin, however, in the International Labour Convention Case[4] proceeded on an altogether different line.

> For purposes of ss. 91 and 92, *i.e.* the distribution of legislative powers between the Dominion and the provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.[5]

Hence the Board came to the conclusion that the subject-matters of the Dominion Acts in question falling within s. 92 were within the exclusive competence of the provincial legislatures, and therefore the Acts were *ultra vires*.

Now, looking at the Government of India Act, 1935, can it be said that for the purposes of s. 100, which deals with the distribution of powers between the Federal Parliament and the provincial legislatures, there is no treaty legislation as such? The answer is no. The relevant sections in this connexion are s. 100, including placitum No. 3 of the Federal Subject List, and s. 106. Placitum No. 3 in the Federal Legislative List includes " the implementing of treaties and agreement with other countries," with regard to which the Federal legislature has power and a provincial legislature has not power to make laws. The main interest, however, concerns the question whether the treaty-making power is comprehensive enough to give effect to treaties and conventions with regard to subjects in the concurrent and the provincial lists. It is quite obvious that subjects which are in the provincial legislative list only can rarely form the subject-matters of international treaties or agreements. But it is not difficult to imagine such a possibility. There might be an international agreement relating to prisons, reformatories, Borstal Institution and other institutions of a like nature. S. 106 of the Government of India Act now becomes relevant, and is worth quoting in full :

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[1] Dr. Jennings: *Canadian Bar Review*, June, 1937, p. 462.

[2] [1930] A.C. 124.

[3] [1930] A.C. 136.

[4] [1937] A.C. 326.

[5] [1937] A.C. 351.

> S. 106(1). The Federal Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous consent of the Governor, or for a Federated State except with the previous consent of the Ruler thereof.
>
> (2) So much of any law as is valid only by virtue of any such entry as aforesaid may be repealed by the Federal Legislature and may, on the treaty or agreement in question ceasing to have effect, be repealed as respects any Province or State by a law of that Province or State.
>
> (3) Nothing in this section applies in relation to any law which the Federal Legislature has power to make for a Province or, as the case may be, a Federated State, by virtue of any other entry in the Federal or the Concurrent Legislative List as well as by virtue of the said entry.

Apparently, the power conferred by placitum 3 in Schedule 7 is limited by this section. To what extent does this limitation run ? It says by subsection (1) that the previous consent of a Governor is necessary in order to make effective any treaty obligation with other countries. But it does not extend to any and every subject whatever. By subsection (3), nothing in this section is to limit the power of the Federal Legislature, which it has by virtue of any other entry in the Federal or Concurrent Legislative List. Apparently by this subsection, the scope of the consent of the governor of a province is cut down to a very few cases. In the concurrent list, placitum No. 27 is about " conditions of labour, welfare of labour, etc." Now, if there is an international labour convention as regards hours of labour, no previous consent of the Governor is necessary. But if one is allowed to read the parliamentary debate in interpreting a statute,[1] the very object of the section was to obtain the previous consent of the Governor before the federal legislature could make a law for enforcing an international labour convention. Leaving aside the question of Federated States, whose Instruments of Accession will provide what subjects they are going to cede to the authority of the Federal Legislature, the position of the section is quite clear. If the meaning is clear and explicit, one cannot, by rules of construction, go behind the statute to the debates to look to the intention of the Parliament. On a proper construction of s. 106, the position is this : if the subject of a treaty is within the federal or concurrent legislative list, no previous consent of a Governor is necessary. Thus the limitation imposed by this section turns within very narrow limits. By reason of placitum 3 only, a federal legislature will have no power to enter into any treaty, which is an exclusively provincial subject. It can do so only with the previous consent of a Governor. But the exclusively provincial list is of an extremely local character. I have already given an example where a provincial subject might be a subject-matter of an international convention. Barring this minor limitation, the authority of the Federal Legislature is untrammelled. But that was not the object of the insertion of s. 106, as would be clear from the debate on this section.

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[1] There are examples where parliamentary speeches have been quoted *in extenso* in elucidation of a particular section or object of a Bill, *e.g.* Haldane's speech in Parliament is referred to in *Amalgamated Society of Engineers* v. *Adelaide S.S. Co.*, 28 C.L.R. 129. See also *Gosselin* v. *Rex*, 33 S.C.R. 255.

Mr. Butler, the Under-Secretary of State for India[1] :

> In items in either the Concurrent or Provincial Lists in relation to which it is necessary to make a law implementing international Conventions, provided that the consent of the units is obtained, we do give power for the unification of the law to be passed by the Federal Legislature.

If that was the object of the section, clearly it has failed. The ground for such an incongruity, if one is allowed to seek for it, is the later insertion of subsection (3) by way of amendment without much discussion after the first two subsections have already been voted. The subsection was moved as an amendment by the Solicitor-General. In his speech[2] he always refers to the Federal Legislative List, whereas in the actual wording of the subsection both the Federal Legislative List and the Concurrent List are mentioned.

In comparison with the Canadian provision, it may be said that there is a treaty-making power as such in the Indian Constitution so far as the federal or the concurrent or the provincial legislative list is concerned. The power lies in the Federal Legislature. But so far as the provincial subjects are concerned, the previous consent of a Governor is necessary, in order to implement a treaty or agreement entered into with other countries. As pointed out previously, there is a no-man's-land in treaty-making in Canada ; but there is no such no-man's-land in the Indian Federation, the executive authority belonging to the Federal Executive in all cases, though the enforcement of any international convention limited to the narrow scope of provincial subjects may fail to be carried out by legislation by reason of the withholding of consent by a Governor as regards that particular province.

[1] 299 H.C. Deb., ss. 1952.

[2] *Ibid.*, ss. 1962.

THE PROGRESS OF LAW REFORM IN CHINA—II.[1]

[*Contributed by* George W. Keeton, Esq., M.A., LL.D.]

Judicial Administration in China.—It has already been pointed out that under the Empire, China possessed no judicial system in the Western sense at all. Every magistrate exercised judicial functions corresponding with his administrative importance. Moreover, the absence of any professional bar necessarily meant that proceedings before the magistrates were conducted with some lack of uniformity and many irregularities, the parties themselves stating their cases. In matters essentially criminal (although there was no clear division between civil and criminal cases) the object of the proceedings was to secure a confession from the accused. In proceedings primarily civil, punishment might also be associated with liability. Unfortunately, too, corruption was frequent, no doubt in consequence of the meagre salaries paid to magistrates.[2] In undertaking the reorganization of her judicial system, therefore, China had to undertake the following tasks:

(1) Create a new system of courts, making proper provision for appeals;

(2) Train an entirely new bench to administer the new codes in conformity with Western principles of judicial administration;

(3) Build up a sound tradition of judicial impartiality and independence;

(4) Establish a professional bar, to assist the judiciary in the achievement of the second and third objects.

(1) *Creation of a New System of Courts.*—The great landmark in the evolution of a modern judiciary in China is the Law of the Organization of the Judiciary of 1909. This created a hierarchy of modern courts of four classes—the Local Court, the District Court, the High Court and the Supreme Court. Subsequently, the Local Court was abolished, so that cases of first instance are now heard in the District Court, whence there is an appeal to the High Court, and from the High Court there is a further right of appeal to the Chinese Supreme Court. Trials in the District Court take place before a single judge. In the High Court a bench of three judges hears appeals, and in the Supreme Court appeals are usually heard by five judges. The English system has fairly obviously been adopted as the model here. To every modern court, however, a procuratorate of

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[1] This article is a continuation of the contribution upon the subject by Dr. Keeton published in our issue for November 1937 (vol. xix, pt. iv, pp. 197 ff.).

[2] See further, Keeton, *Extraterritoriality in China*, vol. i, c. iii, s. 1.

corresponding grade is attached. In criminal cases a procurator conducts the preliminary investigation, institutes and conducts prosecutions, supervises the execution of sentences and controls the judicial police. In civil cases involving matters of public interest and morals, the procurator acts as the State's representative. Actually, the procedure of the modern courts is very similar to the civil and criminal procedure of Japan and of several Continental countries. It is discussed fairly extensively in the Report of the Extraterritoriality Commission.[1] On October 28, 1932, a New Law of the Organization of the Judiciary was promulgated, but it left this structure of the modern courts unaffected.

The comprehensive scheme of judicial reorganization projected in the Judiciary Law of 1909 could quite clearly not be achieved immediately, partly for lack of a sufficient number of properly trained judges, partly because the population of a number of provinces was too backward to permit such a sharp break with the past and partly because the authority of the Central Government was not sufficiently powerful to accomplish this object even had it been otherwise possible. Modern courts were therefore introduced into those cities where Western influence was sufficiently extensive for the Chinese population to be in some measure prepared for the change; in other districts, "transition courts" were established in an effort to bring the procedure of the old magistrates' courts more into harmony with the procedure of the modern courts. The organization and procedure of these courts are partly modern, and partly based on the older system. Finally, in many areas, the old magistrates' courts survived, although a number of regulations have limited their jurisdiction and modified their procedure. The history of judicial reform in China, therefore, is an account of the manner in which the Judiciary Law of 1909 has gradually been extended over increasingly wide areas. At the time when the Extraterritoriality Commission reported (1926) there were in North China 1,800 magistrates' courts as against 150 modern courts and transition courts. Much progress has been made since that date, but numbers of magistrates' courts still function.

There is one Chinese court which stands upon a special footing, and which has played a special part in the introduction of Western ideas into Chinese law. When in the nineteenth century the International Settlement at Shanghai was established for the residence of foreign merchants, great numbers of Chinese of all classes were attracted there, and at first there was no provision for trying cases in which Chinese were defendants. The foreign authorities of the International Settlement were reluctant to admit the uncontrolled authority of a Chinese magistrate within the Settlement limits, and eventually an agreement was reached whereby a "mixed court" was established, presided over by a Chinese official, nominated by the provincial authorities, with a representative of the foreign Powers sitting as assessor. The functions of the foreign assessor steadily increased in importance, and from the first he set himself to eliminate some of the features of Chinese judicial administration which were most sharply in conflict with Western theories, and to introduce cautiously a few principles of Western jurisprudence. The attempt was not as successful as was anticipated, but there was an appreciable infiltration of Western legal ideas in this way, especially when, after the outbreak of the revolution of 1911, the Settlement authorities themselves nominated the Chinese judicial official.[1] In 1927 an agreement was reached partially restoring the Mixed Court to Chinese control, with certain safeguards, and in 1930 a further agreement carrying this process a step farther, and constituting the Shanghai Special Court, was arrived at. The history of the Special Court may therefore be regarded as a test of China's reform movement, for the judges of the court have been picked men, and the Chief Justices have been lawyers of considerable eminence. At first there were occasional difficulties; but after the first year, it is probably not too much to say that the standard of judicial administration, where it was permitted to operate free from administrative interference, approximated to that of European countries.

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[1] Pp. 58 *et seq.*

(2) *The Training of a New Bench.*—The creation of an entirely new type of Chinese judge has been a very difficult thing. The old type of Chinese magistrate has been unable to adapt himself to the new conditions. His training and outlook were directly opposed to any such adaptation. Accordingly, the judges of the new courts have necessarily been Western-trained Chinese lawyers. Wherever possible, judges for these courts have been selected from those who have studied in America or Europe, but this has not always been possible; and in the future, now that Chinese legal education itself has been reorganized, it will probably not be attempted. The Chinese-trained judge who has not been abroad, however, is at a grave disadvantage, for he has not seen judicial independence in operation, and his interpretation of it is not always consistent or wise. This, however, is a temporary feature and should not be overstressed. The pioneers of legal reform in China—Dr. Lo Wen-Kan, Dr. Wang Chung-hui, Dr. F. T. Cheng and many others—have a keen eye for suitable candidates, and the material from which they have to select is increasing.

Another temporary factor requires brief mention. Many of the lawyers selected for judicial office on account of their Western training were necessarily young. It is somewhat dangerous to generalize about youth, but on the whole, it will probably be admitted that the able young lawyer tends to value theory at the expense of practice and shows some impatience at encountering obstacles to what appear to him to be beneficial changes. There has been something of this in the judicial administration of China in the recent past, as a study of the records of the Special Court at Shanghai, to go no farther, will show; but the Ministry of

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[1] The history of the Shanghai Mixed Court is set out more fully in Keeton, *Extraterritoriality in China*, vol. i, c. viii.

Justice at Nanking keeps a watchful eye on the bench, and a sound judicial tradition is rapidly being built up

(3) *A New Judicial Tradition.*—It is time now to examine this new judicial tradition and the factors which have contributed to its establishment and, furthermore, the factors which have impeded its creation. First and foremost must come the work of the Chinese Supreme Court. By Appellate Decision No. 64, in 1913, the Supreme Court laid down the general principle (similar to Art. 4 of the Swiss Code) that :

"Civil cases are decided, first, according to express provisions of law, in the absence of express provisions, then according to custom and, in the absence of customs, then according to legal principles." It will easily be appreciated, in a country whose law was in such a fragmentary condition as China's, how vast was the jurisdiction which accrued to the Supreme Court from this decision. Writing in 1922, Dr. F. T. Cheng said of the Supreme Court :

"It is in this way that the Supreme Court has been able to introduce all the leading principles of modern codes that best suit the special conditions of the country. This is very fortunate for China : for while her various codes have waited for years for sanction without success, most of the fundamental principles of law which obtain in civilized States have, through the medium of the Supreme Court, gradually found their way into this country and will no doubt remain permanently part of the law of the land. The tardiness in the promulgation, or rather non-promulgation, of various codes is merely an accident due mainly to the unsettled state of the country in the last few years which has turned the attention of Parliament to graver questions. But the building up of this unwritten law by the Supreme Court has its own advantages : it familiarizes the people with the idea of modern law step by step, since every principle introduced has been tested by actual experience. This body of unwritten law has now reached many volumes ; it serves as a constant guide to the lower courts and is in fact daily applied.

"To this body of unwritten law that has grown up by the declaration of principles must be added another body of unwritten law that has grown up through interpretation. The power of interpretation, or rather to 'unify interpretation,' was first conferred on the Supreme Court by the Law of the Organization of the Judiciary and then expanded by the Supreme Court Regulations, as follows : '(1) To explain and answer doubtful points ; (2) To rectify, in the interests of the State, any erroneous interpretation of statutes or ordinances that may have been rendered by any public office or official. . . . The interpretation of any statute or ordinance rendered by the court in one case shall be binding in another of the same nature.'

"In practice the facts of a concrete case are submitted to the court for opinion and the court gives its reply by a letter, which reply is, as a matter of course, followed. This power possessed by the court is unique ; it recalls the *epistolæ* of the Roman emperors. It is now a matter of daily occurrence that request for interpretation is made to the court by one department or another, and in this way many defects in the law have been remedied and much guidance afforded to the lower courts in their solution of difficult legal problems. It has been observed by one of the Lord Chancellors of England that the Judicial Committee of the Privy Council is the loving heart of the British Empire, because its administration of justice has inspired so much confidence in the people under British rule, that even men by whom the faces of those who sit on the committee have never been seen and their voices never been heard, willingly submit their disputes to the committee for settlement. The same may be said of the Supreme Court of this country, which has inspired so much confidence in the people that it commands throughout the country a respect which authority alone could not obtain, and this is the more remarkable since the Supreme Court is still in its infancy."[1]

Now that most of the codes have been promulgated, the function of the court in establishing principles governing their interpretation and application is almost as important as its functions in the days before the codes existed.

Since the advent of the National Government there have been important changes in the functions of the Supreme Court, in order that the judiciary shall be in harmony with the changed political and social outlook. In 1928 the Supreme Court was reorganized as a part of the Judicial *Yuan*, and the President of the Judicial *Yuan* is also in practice the President of the Supreme Court. Further, as Dr. Cheng pointed out, before 1927 the Supreme Court had a power of interpreting the laws, a power which it shared with the Ministry of Justice. The Ministry interpreted laws on judicial administration, and the Supreme Court interpreted laws upon matters arising in litigation. These powers are now vested in the President of the Judicial *Yuan* and the new Law for the Organization of the Judiciary provides:

> The President of the Judicial *Yuan* has the power to unify the interpretation of laws and ordinances as well as to change the effect of preceding decisions upon future cases. This power is to be exercised in accordance with conclusions reached in plenary sessions presided over by the President of the Judicial *Yuan* and attended by the President and Presiding Judges of the Supreme Court.

It is clear that these changes have diminished the independence of the Supreme Court—a change that was inevitable in view of the policy of the Kuomintang. This pre-eminence of the executive over the judiciary will be discussed later; but one further point must also be noticed. The Supreme Court has recently adopted, with the approval of the Judicial *Yuan*, the policy of summoning to Nanking every three months a body of twelve judges of High Courts and Branch High Courts in various provinces. Each of the twelve judges is to be assigned to one of the twelve divisions of the Supreme Court for service for three months. At the expiration of this period, the twelve return to their original posts in the provinces, and a further twelve are summoned. In this way, opportunities are given to provincial judges to become better acquainted with the workings of the Supreme Court, whilst Supreme Court judges are also given opportunities of familiarizing themselves with local conditions. Moreover, the system is a valuable aid when the selection of candidates for promotion to the Supreme Court is contemplated. This system is at once a valuable aid to centralization of justice and to the maintenance of a sound judicial tradition ; but it is also a method of ensuring that local judges continue to administer justice in accordance with the social principles of the Kuomintang.

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[1] Cited by Tyau, *China Awakened*, pp. 260–1.

Amongst the other formative influences in establishing the new Chinese judicial tradition must be classed the Consular Courts of the Powers with extraterritorial rights in China. Here the Chinese could see a variety of foreign laws administered by consular officials with legal training, and at Shanghai, the United States and Great Britain appointed to the Consular Court a judge of high legal qualifications. Since 1926, moreover, the Consular Courts, wherever practicable, have been administering the Chinese codes, in accordance with the recommendations of the Extraterritoriality Commission.

It should also be mentioned that when Germany and Austria lost their extraterritorial rights after the war, and when Russia voluntarily relinquished them in 1924, China established certain Special Courts in Manchuria to try cases involving foreigners who had lost their extraterritorial rights. In these courts the Chinese regarded their new system as " on trial." Specially qualified judges were invariably appointed, and until Manchuria was lost to China in 1931 the courts on the whole functioned in accordance with Western requirements.

It has been shown how China since 1907 has been laboriously trying to build up a modern judicial tradition along Western lines. It is a little ironic, therefore, that she has clung tenaciously to this ideal in circumstances of very great difficulty, at a time when several Western countries where dictatorships have been established have abandoned it. In the early days following the Revolution, the Supreme Court successfully vindicated its independence of the executive.[1] At that time it was thought that the transition to parliamentary democracy in China would be speedy and comparatively painless. Events turned out otherwise. Between 1917 and 1927 China was under the control of provincial militarists. Over large areas military tribunals, administering martial law, held undisputed sway. Even where the ordinary law remained technically in force, judicial independence was often only a figment of the imagination. Much of the ground won between 1907 and 1917 was therefore lost. The advent of the Nationalists in 1927 ended this unhappy system in the areas over which the Nanking Government established effective control, and the process of judicial reorganization was resumed.

[1] Tyau, *China Awakened*, p. 262.

Now, however, a different problem arose for solution, and as yet it cannot be said that the problem has been solved. Chinese Nationalism, it has been shown, is in line with the dictatorial Governments of Europe, whether Communist or Fascist, in that it is based upon the organization of a single party which tolerates no effective opposition. It adopts this policy, as the dictatorial Governments of Europe do, because it believes that to it has been committed the task of introducing a new social order peculiarly suited to the country's needs. Law thus becomes merely an instrument for the achievement of this social order, and judges are regarded merely as a special type of official for its achievement. Judges must be of unblemished integrity, they must be impartial between private citizens, but they must also be firm believers in the new social order. There are plain evidences of this in the changed function of the Supreme Court. It is clear that such an outlook, in China as in Europe and America, saps judicial independence as it has been established in the democratic individualist countries of the West, and in fact the judiciary in China has recently tended to be subordinated to the executive. Even in the Shanghai Special Court, where foreign influence has been unremittingly directed towards the maintenance of the independence of the judiciary, the story has been one of successive attempts at administrative interference, and several Western-trained Chief Justices in succession resigned for this reason. It is evident that in this respect China is facing exactly the same problem which confronts Western civilization, and no solution of it can profitably be attempted here. Two points only need be noticed. The first is that China's Western tradition is derived mainly from Great Britain and the United States. China's leading lawyers have been profoundly impressed by the prestige, collective and individual, of the House of Lords, the Judicial Committee of the Privy Council and of the American Supreme Court. How profound that may be in a particular case may be appreciated from an essay by Dr. John C. H. Wu, "The Mind of Mr. Justice Holmes" in *The China Law Review*,[1] and from the exceptionally revealing correspondence published by Dr. Wu in the *T'ien Hsia Monthly* in October 1935.[2] Dr. Wu was for a short time Chief Justice of the Shanghai Special Court and resigned rather than submit to administrative pressure. The second point is that China does not pay lip-service to Western ideals. If she adopts them, she does so from conviction, and all indications point to the fact that China has fully appreciated the value of this one. Moreover, the Kuomintang programme does not visualize a permanent party dictatorship. The ultimate ideal is a free democracy, and in that an independent judiciary must necessarily have a place. Administrative pressure in China's case has probably been due primarily to anxiety to hasten the process of transition.

(4) *The Establishment of a Professional Bar.*—China's problem, in the

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[1] August 1935, p. 77.

[2] "Some Unpublished Letters of Justice Holmes," *T'ien Hsia Monthly*, October 1935, p. 251.

establishment of a professional Bar, has been of the same type as that of the Western States of the United States in the middle of last century, although the difficulties to be overcome were much greater. Shortly after the establishment of the Chinese Republic, regulations were made governing admission to the Bar. There was no requirement of general education: good moral character was the only essential, coupled with evidence of legal education, either at a recognized law school in China or abroad for a certain period, varying from eighteen months to two years, or evidence that the applicant had been teaching one of the principal subjects prescribed for the lawyers' examination at a recognized law school, or had held the office of judge or procurator. An alternative to these qualifications was simply the passing of the lawyers' examination, the standard of which was not high. The result was that in the early years of the Republic, China had a large number of lawyers with low qualifications and no sign of a common tradition. The effects of this policy were perceived by the Chinese Government, with the result that for some years licences were only granted to returned students and a few others, the licence fee being raised from $10 to $200. With the advent of the National Government, a new standard of qualifications was introduced, the principal one being graduation from a recognized law school, and there is now no danger of the errors of the early years of the Republic being repeated.

The function of the professional lawyer as the fearless guardian of his client's interests, and also, when he comes into court, as the court's guide on matters of law, is still an exceedingly new one in China, and it may be doubted whether Bench and Bar as yet enjoy the mutual understanding which they ought to do, more especially when it is remembered that China has adopted the Continental system of separating aspirants to judicial office from their fellow-lawyers, and subjecting them to a special professional training. One factor which has undoubtedly influenced the growth of the legal profession in modern China, however, is the existence of the International Bar at Shanghai practising both before the Consular Courts and also before the Special Court, formerly the Mixed Court[1]: In 1911 Chinese were admitted to the International Bar, and for some years the majority of Chinese so admitted were graduates of European and American law schools, who became pupils of foreign lawyers. In this way they acquired an intimate knowledge of foreign legal traditions, particularly of the Anglo-American, and before the Special Court they were able to test its implications, in association with their foreign colleagues. There can be little doubt that the Chinese lawyers at Shanghai, a number of whom have subsequently achieved eminence in the work of law reform, have done a great deal towards establishing the new profession's status.

Chinese Legal Theories, Old and New.—If one compares China's modern judicial organization and codes with those which existed until the beginning of the present century, it is easy to see how profoundly China has been influenced by Western legal theories, even though it is as yet impossible to say what will be the final result of that influence in the sphere of law. China has, in fact, abandoned her traditional theory of law in favour of one whose origin is quite clearly in the West, even though the new product is a vigorous one, with inherent capacities for self-development, and even though it operates upon essentially Chinese material.

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[1] See further, Kotenev: *Shanghai, Its Mixed Court and Council*, c. xi, p. 202.

The traditional law of China found its final expression in the *Ta Tsing Lü-Li*, or Code of the Manchu Emperors. This was founded upon a great code compiled at the command of the Mongol Emperor Yung Lo at the beginning of the fifteenth century. When the Mongol Emperors were replaced by the Mings, the new dynasty adopted the code of its predecessor, and the Manchu Emperors did the same, making necessary modifications to include Manchu customary law. The last edition of the Code appeared in 1890, and was the one used by Père Boulais in his monumental translation. All editions of the Code were prepared in accordance with the principle that in each section there appeared the *lü*, or main principles, which were transmitted virtually unaltered, followed by the *li*, or supplementary laws, modifying or extending the main principles, in accordance with the requirements of the times. The *li* therefore varied considerably, and an interesting picture of Chinese judicial administration could be built up from its changing content.

Sir George Staunton, who translated only the *lü*, observed of the *Ta Tsing* Code :

> By far the most remarkable thing in this code is its great reasonableness, clearness and consistency, the business-like brevity and directness of various provisions and the plainness and moderation in which they are expressed. There is nothing here of the monstrous verbiage of most other Asiatic productions, none of the superstitious deliberation, the miserable incoherence, the tremendous *non sequiturs* and eternal repetitions of those oracular performances—nothing even of the turgid adulation, accumulated epithets and fatiguing self-praise of other Eastern despotisms—but a calm, concise and distinct series of enactments, savouring throughout of practical judgment and European good sense, and if not always conformable to our improved notions of expediency, in general approaching to them more nearly than the codes of most other nations.

These latter observations should not be misunderstood, however. The Chinese Code is probably farther from Western legal tradition than any other code of which we have knowledge, for it is based upon a principle which is exclusively Chinese. According to this theory, laws are enacted primarily for the purpose of securing the subordination of the people to those in authority over them, and not for the purpose of enforcing rights amongst the people themselves. There is, in fact, according to this theory, a natural harmony in all things, human and divine, and this harmony is secured by the fulfilment of an individual's duties to his family, to his neighbours and to his rulers. For this reason Chinese law prescribes in great detail the ceremonial to be followed upon all public occasions. Any innovation therein is a capital offence, and deviations therefrom are to be stamped out by punishments. This explains the much-discussed form of the Chinese Code.

"The *Ta Tsing Lü-Li* covers the whole field of such parts of private and public law as the Chinese legal mind would then consider as reducible to written statutory provisions. It deals with administration, finances, army, public works, penal law, family law; few of its provisions relate to the law of obligations, which was left to be governed by custom. It is quite characteristic of the old traditional conception of Chinese Civil law that it is not so much to regulate private intercourse between individuals and to delimit their respective rights than to preserve the general harmony of the universe. More emphasis is laid in the *Ta Tsing Lü-Li* on the duties of the people based on ethical principles than on their claims. Every violation of a legal rule, although it might injure only a private interest and involve no criminal responsibility in the modern sense of the word, constitutes in this system a breach of the order of the world, the safeguard of which has been entrusted by Heaven to the Emperor, and therefore involves for its author not only civil consequences such as compensation for the damage caused, but a penalty for transgression of an ethical precept." [1]

A consideration of these factors helps us to appreciate the tenacity and the stability of the traditional law, which was simply an imperfect attempt to establish an immutable world-order. The nature of the punishments might change from time to time, but never their object. The same factors also enable us to appreciate the implications of that assumption of superiority by Chinese officials which foreigners always experienced with irritation. The Chinese Empire—"The Middle Kingdom"—was the keystone of the arch of universal harmony. Remove it, and the whole erection collapsed. Hence it followed that foreigners, no matter what their origin, moved merely on the outer fringes of this cosmic system.

China abandoned these underlying assumptions when she made the decision to reform her legal system. Her modern system is based upon the same assumptions as Western legal systems, *i.e.* defined territory, popular sovereignty and the existence of other mature legal systems operating within national boundaries. It has been necessary, therefore, to undertake the formulation of a new legal philosophy. What has Western law to offer China, and how much is China availing herself of the opportunity to borrow? These are exceedingly difficult questions to answer, partly because China has been so busy reforming the material of the law that she has as yet enjoyed little opportunity of formulating a philosophy, and partly because no complete answer can be given to this question without a

[1] *Civil Code of China.* English translation by Ching-lin Hsia, James L. E. Chow and Yukon Chang, pp. ix–x.

fuller analysis of the social, political and economic doctrines which guide the Kuomintang than is possible here. Only one or two guiding factors can be indicated. In the early stages of the reform movement, China was influenced primarily by Japan, and through Japan by Germany. Nevertheless, comparatively few Chinese students studied law in Germany. Of those who went farther afield than Japan, the overwhelming majority went to the United States or to Great Britain. Some of these have already attained the highest administrative posts, both before and after the advent of the National Government, and their influence has been out of all proportion to their numbers. These Chinese lawyers admire many features of the Anglo-American legal system. They are aware of the power of the Bench in England, and of the Supreme Court in the United States; they see the value of judicial independence, and they appreciate the fact that the Common Law, intractable material though it may be, has proved historically to be the foundation of Anglo-American civil liberty. At the same time, they are repelled by the formlessness of Anglo-American law. As one eminent Chinese jurist once said to me: " We like your laws, and for some reasons we would have preferred them as a model for our own, but we cannot codify your own laws for you." The criticism is just, and although it would not be hard to point out important resemblances between the English and the Chinese attitude to law—respect for precedent is one—China has drawn her inspiration, within limits, for the substantive law, and for judicial organization, from the Continent.

There is a further point which must not be overlooked. English juristic thought as a whole has been, until very recently, pronouncedly insular, and remarkably unselfconscious. It has proved a barren field for the Chinese jurist. Possibly this is because the jurisprudence of England is the jurisprudence of a stable society, which assumes much in social life which jurists of other nations would challenge. In any event, there is no indication that any English jurist has directly affected the development of modern Chinese legal thought to any appreciable degree. On the other hand, there are plain evidences of German influences. Marx, Stammler and Ehrlich have obviously been read, but ultimately most Chinese lawyers with a foreign training come back to the American school, whose doctrines they seem to have imbibed with enthusiasm. It may be that the Chinese have realized that American legal theory is wrestling with problems not too remote from those which arise in China for solution, or it may be that the vigour of Holmes, Cardozo and Pound attracts them.[1] However that may be, there is a profound admiration for these thinkers, and an acceptance of their teachings concerning the judicial function. The judge must adjudicate, but he must do more. He must take a leading part in the formulation of the social order. He is not merely a working mason, but an architect. Possibly in this respect the Chinese would go farther than the American school, but then it is the fashion of disciples to outrun their teachers. One final suggestion may be offered. In France, in the United States and even to a lesser degree in England, in the writings of Professor Laski, one sees the elaboration of the view of law as an instrument for the effectuation of a social purpose—the employment of the material and human resources of a political society for the common welfare, so that out of these materials a true commonwealth may be created. It is a view which does not abolish private rights, though it restricts the orbit of their enjoyment in the common interest. The connecting link between them all is the regulation of individual activity for the promotion of the common welfare. There is a fundamental difference between such views and those of Soviet jurisprudence on the one hand [1] and the jurisprudence of the totalitarian State on the other, for the totalitarian State implies a deification of the State and an absolutism in government which is repugnant to Chinese thought. China, it has been shown, has been governed by a single party since 1927, but merely for an educative purpose. When that purpose has been fulfilled, and only then, democratic government will be possible ; and one would prefer to believe that in this the modern Chinese jurists have shown a sound instinct in identifying themselves with the true line of development in Western civilization.

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[1] See, *e.g.*, Dr. John C. H. Wu, " The Mind of Mr. Justice Holmes," *The China Law Review*, August 1935, p. 77.

[1] See, *e.g.*, S. Dobrin, " Soviet Jurisprudence and Socialism," 52 *Law Quarterly Review* (1936), p. 402.

CONVENTIONS OF THE CONSTITUTION.

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IT is proposed in this paper to consider two questions regarding the conventions of the constitution: (1) Why conventions are obeyed, and (2) How conventions arise.

Why Conventions are Obeyed.—That is the question which " puzzled " Dicey and occupied most of his attention. " What is the sanction by which obedience to the conventions of the constitution is at bottom enforced ? " [1]

He first gave to it what he called a " partial " answer, that as a matter of fact the conventions of the constitution are not obeyed in their entirety. " The invariableness of the obedience to constitutional understandings is itself more or less fictitious," [2] and the " special articles of the conventional code " are as often disobeyed as they are obeyed. Dicey's meaning was that the conventions that are occasionally disobeyed are only those which are " not considered as true constitutional rules," while all those conventions which are considered to be a part of the constitution are almost invariably obeyed.[3] Put in other words, this would imply that " in fact, obedience to the conventional precepts of the constitution is ensured by the force of public opinion." [4]

Although, as we shall show later, this answer constitutes the best possible explanation that can be given of the sanction behind conventions, yet it did not satisfy Dicey. He started arguing in a different direction, and came to the conclusion that " the sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which those principles are expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the courts and the law of the land." [5]

To support his conclusion, he gave two examples [6]: (1) that the rule that the Parliament must assemble at least once a year, even though not derived from Common Law or any specific statutory enactment, is obeyed quite rigorously, for a violation of it would involve the ministry as well as hundreds of other people concerned with the government of the United Kingdom in distinct acts of illegality cognizable by the tribunals of the country; (2) that similarly, the rule that the Ministry ought to retire on a vote that they no longer possess the confidence of the House of Commons is universally followed, for a breach of it would again involve the Ministry in all the inextricable embarrassments which immediately follow upon the omission to convene Parliament for more than a year. "We have, then, a right to assert that the force which in the last resort compels obedience to constitutional morality is nothing else than the power of the law itself. The breach of a purely conventional rule, of a maxim utterly unknown and indeed opposed to the theory of the law, ultimately entails upon those who break it direct conflict with the undoubted law of the land."[1]

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[1] Dicey: *Law of the Constitution*, 8th ed., p. 435.
[2] *Ibid.*, p. 436.
[3] *Ibid.*, p. 437.
[4] *Ibid.*, p. 440.
[5] *Ibid.*, pp. 441–2.
[6] *Ibid.*, pp. 442–6.

But Dicey's explanation, although seemingly plausible so far as it goes, is, in reality, very inadequate. As pointed out by Dr. Jennings,[2] the result thus elaborated by Dicey would not necessarily follow in the second case until a substantial time has elapsed: when the financial legislation and the Army and Air Force Acts have passed the House of Commons, as they normally do by the beginning of July, the Ministry may remain in office without breaking the law at least until the following April. In any case, Dicey's examples do not exhaust the whole stock of the conventional code. It is not difficult to think of other conventions than the two mentioned by Dicey, which are obeyed quite as surely as these ones, but which are not at all supported by law. Dicey himself admits that "the rule that a Bill must be read a given number of times before it is passed is, though a well-established conventional principle, a convention which might be disregarded without bringing the Government into conflict with the law of the land. A ministry who induced the House of Commons to pass an Act, *e.g.* suspending the Habeas Corpus Act, after one reading, or who induced the House to alter their rules as to the number of times a Bill should be read, would in no way be exposed to a contest with the ordinary tribunals."[3] And yet a Bill is habitually read the same number of times, and no ministry does normally think of changing the rule. Similarly all "administrative" conventions could be broken without any fear of having finally to break the law and incur the penalties of a law-breaker.

Dicey's explanation, therefore, does not apply to all conventions. By referring to "the fundamental principles of the constitution and the conventions in which these principles are expressed," he, in fact, himself unconsciously excepted from his explanation all those simple conventions which do not involve any fundamental principle, but which are recognized conventions of the constitution all the same. But even within the sphere of "fundamental" conventions, Dicey's principle falls to the ground in the case of the conventions governing the relations of the British Government with the Dominions. Although, before 1931, the Dominions were, in point of law, definitely subordinate to the Imperial Government, so that no measure of the Imperial Parliament, however flagrantly interfering with the internal affairs of a Dominion, could have conflicted with the law of the land, yet it is unimaginable that the British Parliament would have ever, in normal circumstances, contemplated any measure of that kind. Similarly, to-day, even though it is legally open to the British Government to conclude an offensive and defensive alliance with any other country and commit the whole British Empire including the Dominions to such an alliance, it is hard to believe that the British Government would ever think of doing so.

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[1] Dicey: *Law of the Constitution*, 8th ed., p. 446.

[2] Jennings: *The Law and the Constitution* (1st ed., 1933), p. 100.

[3] Dicey: *op. cit.*, p. 26, footnote.

It will thus be clear that Dicey's argument, although it applies to a few important cases which determine the relations between the Cabinet and the House of Commons, is, on the whole, extremely inadequate. It does not explain the problem as a whole. It applies even to those few cases because of the typically illogical manner in which the Bill of Rights changed the law of England in 1689. It divided the powers of government between the King and the Parliament in such a way that neither by itself was able to carry on the functions of government. Each had the power to hamper the other's activities. As a natural result of it, there came into being a highly intertwined system of governmental authorities, in which each depended upon the other's co-operation. Since, in such a scheme, conventions developed to make that indispensable co-operation possible, naturally the observance of those conventions would be obligatory, for otherwise one factor would automatically come into conflict with the other, and ultimately with the law of the land. But what is true of these conventions governing the Cabinet system of government is, from the very nature of things, not always true of other conventions. Conventions do not always develop out of an illogical legal system. They do certainly develop in order to bring the constitution into line with the progressive changes in the political and social ideas of the people living under it; but that would not imply that conventions depend for their existence and observance on the security of the law: that would rather imply that conventions depend for their observance upon the security of public opinion. It is not, therefore, necessary that the breach of conventions must be accompanied by a conflict with the law of the land: in order that a convention may continue to be observed, what is necessary is that the breach of a convention should mean a conflict with the public opinion of the land.

The truth of this position was recognized as early as 1886 by Sir William Anson, who wrote in his *Law and Custom of the Constitution*[1]:

"But we must not forget that the possible violation of the law is not the only reason why a ministry should retire when it is shown to have lost the confidence of the House or of the country. Ministers are not only the servants of the King, they represent the public opinion of the United

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[1] Sir W. R. Anson: *The Law and the Custom of the Constitution*, 4th ed., vol. i, p. 383.

Kingdom. When they cease to impersonate public opinion, they become a mere group of personages who must stand or fall by the prudence and success of their actions. They may have to deal with disorders at home or hostile manifestations abroad: they would have to meet those with the knowledge that they had not the confidence or support of the country; and the opponents at home and abroad would know it too.

"We arrive, then, at this point that the King as represented by his Ministers must, by the conventions of the constitution, work in harmony with public opinion as represented by the members of the House of Commons. The legal necessity lies only in the background: it forms an ultimate sanction, which is not often present to the minds of those who act upon it."

There is certainly a legal necessity, although, as Anson says, it provides only an ultimate sanction, not often present to the minds of those who act upon it, in the case of conventions governing the relations between the Ministers and the House of Commons; but, as we have shown before, in the case of a very large majority of other conventions, there does not exist any ultimate legal sanction at all. It is wrong, therefore, for Dicey to lay down a general principle that conventions are obeyed because of the sanction of law. Primarily the obedience to conventions is due to the sanction of public opinion.

The same thing was said by Dr. Jennings, when he wrote[1] that "the working of a constitution implies an integration of many individuals. Each has rules which he must follow if he is to play his part. If the Cabinet does not resign when it clearly cannot get a majority, it will no longer have a tool in Parliament. Some officers in the army may possibly refuse to obey orders. . . . Some taxpayers may refuse to pay illegal taxes. . . . What is, indeed, certain is that they are unlikely ever again to secure public confidence, and if they wish to continue in office, they must overthrow the whole constitution. Similarly, if the British Parliament breaks conventions relating to Dominion Status, difficulties relating to the Dominions will at once face them."

Public opinion, or, what is the same thing, fear of social and political difficulties and complications, then, is the real guarantee for the observance of conventions, or, indeed, of laws themselves. Rules are normally obeyed because it is the habit to obey them, whether they are laws or conventions. When that is not enough, it is the prospect of serious difficulties that acts as a restraining and compelling force.

How Conventions Arise.—That brings us to the consideration of the second question regarding the conventions of the constitution, as to how conventions arise.

This aspect of the problem of the conventions of the constitution was not tackled by Dicey at all. In the introduction to his monumental work on the Law of the Constitution, he did analyse[2] some of the notable conventions that have arisen during the last thirty years; but with the theoretical question as to how conventions arise he did not concern himself anywhere in the book. The question has been tackled, for the first time, by Dr. Jennings in his two books, *The Law and the Constitution*[1] and *Cabinet Government*.[2]

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[1] Jennings: *op. cit.*, pp. 104–5.

[2] Dicey: *op. cit.*, introduction, pp. xlviii–lvii.

Dr. Jennings starts from the hypothesis that "conventions grow out of practice, and their existence is determined by precedents."[3] But that hypothesis is much too simple to satisfy him, for he finds that "precedents, like analogies, are rarely conclusive."[4] One often comes across cases in which practices well established for hundreds of years are suddenly dispensed with. Take for example two such practices: (1) Although from the reign of Edward III onwards the Convocation of the Church of England used to be summoned at the same time as the Parliament, yet in 1921 it was suddenly decided that that was a matter of practice and that, therefore, a Convocation could be dissolved at any time without a dissolution of Parliament; (2) Similarly, for quite a century the King's speech to Parliament used to be approved in Council, but that practice was also dispensed with in 1921.

The conclusion, therefore, that Dr. Jennings comes to is that, in order to give rise to a convention, mere practice or mere precedents are not enough. The fact that an authority has once or even for a long time behaved in a certain way is no warrant for saying that it ought to behave in that way in the future, unless it can be shown that in acting in a particular way at any time the authority and those connected with it were doing so with a clear understanding and consciousness that it was incumbent upon them so to act. Precedents create a rule, because they are recognized as creating a rule. Practice creates convention, because practice is recognized to be normative.

For the creation of a convention, therefore, the most important fact is that of its general recognition. A precedent becomes normative only when its existence and the duty to obey it are generally recognized. Now, general recognition may be secured in one of two ways: it may be secured by the gradual crystallization of a practice into the form of a binding rule, or it may be secured by a definite agreement between the various factors to act in a particular way. Past practice, therefore, is not the only possible way for the creation of conventions: conventions might as well arise by means of a formal agreement between persons and authorities as to how they shall act in the future. We shall come to that, however, a little later.

Meanwhile, to go on with Dr. Jennings's argument. After accepting that precedents become conventions only if they are generally recognized to be creating a rule, Dr. Jennings feels that such general acceptance cannot always be proved, and yet occasionally one simple precedent may overthrow a long-standing rule. "Until Mr. Disraeli resigned in 1868, no Government had resigned on defeat at the polls and without meeting Parliament. Until 1932, no modern Government had agreed to differ. Was it possible to say in 1868 that Mr. Disraeli's act was unconstitutional, or in 1932 that the Cabinet's act was unconstitutional? The approach to the answer to these questions indicates an important characteristic of conventions. They do not exist for their own sake: they exist because there are good reasons for them." [1]

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[1] 1st ed. (University of London Press, 1933).

[2] 1st ed. (Cambridge University Press, 1937).

[3] *Cabinet Government*, p. 5.

[4] Viscount Esher: *The Influence of King Edward*, p. 67, quoted by Jennings.

Dr. Jennings, therefore, comes to this final conclusion, that precedents create conventions simply because they have reasons of a general nature which relate them to the existing political conditions. "The precedent of 1868 was due to the recognition of altered political conditions. The precedent of 1932 was due to exceptional political conditions. It was created for what were alleged at that time to be specific purposes. It was said that the question of general tariffs was not one of the main problems which the Government had been formed to resolve, but was merely incidental. Accordingly it was argued that members of the Cabinet might speak and vote against the proposal of the majority, which became the proposal of the Government. The precedent, therefore, did not change the ordinary rule of collective responsibility. It provided an exception to it, capable of application only when the conditions were similar. For this exception special reasons were given: they may not be convincing; but in 1932, as in 1868, there were reasons." [2]

From Dr. Jennings's explanation above, it is easy to see that his insistence upon reasons behind conventions is very misleading. For if reasons alone, however unconvincing, are to be the criterion for the observance or non-observance of earlier practices, then, surely, no custom of the British Constitution, however fundamental, may for long be safe. It is not impossible to think of situations when even the King might be able to put forward strong and special reasons for using his veto or exercising any of his lost prerogatives. In 1914, when the Parliament was considering the Government of Ireland Bill, a considerable section of the British opinion favoured the King's vetoing the Bill: both inside the Parliament and outside in the Press, arguments were advanced to show that the King's prerogative to veto a Bill passed by Parliament was still in existence, and that political conditions being of an exceptional nature, the King ought, if forced to that necessity, to exercise that prerogative in the case of the Government of Ireland Bill and force the Cabinet to appeal for a decision to the people.[3]

From this it will be evident that it is dangerous to plead that a precedent becomes a convention only because there exists a good reason behind it. In the rise of conventions, the important factor is not the existence of a reason behind a precedent, but the fact of the general recognition of that precedent, the belief of the actors in a practice that they are bound by a rule. Certain small changes in the simple and formal types of conventions may, sometimes, be made by people in authority, as for example in the two instances given by Dr. Jennings of the years 1868 and 1932 ; but in such cases, neither the former practice nor the change introduced makes any material difference as to the working of the constitution. In the case of the practices of a fundamental character, reasons alone should not be sufficient. It is presumable that when a contingency arises in which general acceptance cannot be proved, it might be decided one way or the other by the pressure of public opinion, which may and would certainly be influenced by reasons adduced by the two parties to the conflict ; but to say that reasons, although they may not be convincing, would by themselves lead to the rise of conventions is surely a mistaken view.

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[1] *Cabinet Government*, p. 7.

[2] *Ibid.*, pp. 7–8.

[3] House of Lords Debates: Lord Londonderry's speech on July 2, 1914. House of Commons Debates: Sir Edward Carson's speeches. Also, Bonar Law's speech at Edinburgh on January 24, 1913. Lord Halsbury's on November 5, 1913 (both reported in *The Times*). G. Wallas: *Our Social Heritage*, 1921, ch. x, pp. 227–8.

The rise of conventions, then, is ultimately due to the fact of the general recognition of a practice. But general recognition, as we said before, may be secured in two ways. It may be secured by reason of a long practice finally crystallizing into a rule, or it may be secured by means of a definite and formal agreement even before the practice begins. As to how it is secured in any particular country amongst any particular people would be determined largely by the conditions of life and the temperament of the people of that country. In England, for instance, where people are naturally inclined to compromise and prefer to tackle the immediate problems and solve them rather than to work out absolute theories, general acceptance would usually be secured by the first process. A practice would grow up unconsciously, would be followed unflinchingly for a long time, and would finally become hardened into a principle. Persons of authority would start asserting in their writings that the practice exists, and for all practical purposes the practice would be recognized to exist as an integral rule of the constitution. The same process has taken place in some of the Dominions. In Canada, for instance, self-government has largely arisen as the result of certain incidental practices followed for a long time.

But that does not mean that that is the only or even the best way in which general acceptance for conventions may be secured. Amongst a more logical people than the English, conventions would often arise as the result of a definite and formal agreement. In Ireland, whatever conventions have arisen have arisen by means of a formal agreement. The same is largely true of France. In India, recently, the Congress Party was demanding a definite and formal assurance from the provincial governors that they would not exercise their extraordinary powers of interference in the ordinary day-to-day activities of the Ministers.[1]

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[1] House of Lords Debates : June 8, 1937.

This difference in the procedure for securing general acceptance for conventions is not always due to differences of racial character. Sometimes, in the same country, people of different temperaments prefer different methods of establishing a convention. It was in England, for instance, that in 1839 Sir Robert Peel thought it expedient before forming his ministry to ask for a definite assurance of confidence from Queen Victoria, laying down that the evidence of this confidence was to be twofold: (1) that the Queen would dissolve the Parliament and hold new elections on Peel's advice; and (2) that she would agree to change at least a few of her Ladies of the Bedchamber on Peel's recommendation, for Peel was afraid that since all these ladies belonged exclusively to the other party they might influence the Queen's judgment against his own party.[1]

In considering how conventions arise, there is one more point which we must not forget. Whether conventions arise through practice or through a formal agreement, there is always a pronounced tendency for their ultimate legalization. This is particularly true of the fundamental conventions, because of their great importance in the ordered scheme of government. Even in England, most of the determinant conventions have already been legalized: the relations between the two Houses of Parliament and the relations between the United Kingdom and the Dominions have been legalized by the Parliament Act of 1911 and the Statute of Westminster of 1931 respectively. The relations between the Cabinet and the House of Commons alone have not been put in terms of law. For that the reason is that the Cabinet system of government is so well intertwined with the legal system of the country that it cannot possibly be superseded.

This analysis leads to the clear conclusion that definition and legalization are ultimately the only way by which fundamental conventions are really secured. This definition may come first or it may come last. The process whereby it comes is comparatively less important than the fact that it does come.

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[1] G. K. Clark: *Peel and the Conservative Party*, pp. 315–25. *Queen Victoria's Letters*, 1st series, vol. i, pp. 198–218.

SECURITIES LEGISLATION IN CANADA.

[*Contributed by* K. B. Palmer, Esq., B.A., B.C.L.]

It is proposed in this article to outline the principal features of certain legislative measures which have been adopted with a view to controlling or regulating the activities of persons dealing in shares or securities in Canada. In this connexion it is necessary to bear in mind the division of powers and jurisdiction as between the Dominion and the various Provinces and the complications to which this necessarily gives rise.

Generally speaking, companies may be incorporated in Canada under either Dominion or Provincial legislation. By s. 92 of The British North America Act, 1867, the Provinces were granted exclusive power to legislate with respect to " the incorporation of companies with provincial objects " ; the Dominion, however, has power to incorporate companies having objects which are not exclusively provincial in scope. One result of this division of jurisdiction as regards the incorporation of companies has been that each of the nine Provinces has enacted its own Companies Act, and there is in addition a Dominion Companies Act providing for the incorporation of Dominion companies.

A Province can confer upon a company incorporated under its laws the right to carry on business and otherwise exercise its corporate powers only within the territorial limits of that Province. A company incorporated under the laws of one Province has capacity, however, to carry on its business in any other Province if permitted to do so by the laws of such other Province and subject to any relevant statutory provisions in force therein with reference to extra-provincial companies. A Dominion company, on the other hand, has a status and capacity which entitle it to carry on business anywhere in Canada, and such status and capacity are not affected by the fact that the company may choose to confine its operations to one Province. However, a Dominion company is subject to provincial laws which are applicable to companies generally and which do not derogate from the status and capacity of the company or discriminate against Dominion companies as such. For example, The Companies Information Act of the Province of Ontario requires a prospectus to be filed with the Provincial Secretary by every company (other than a private company) upon the establishment in Ontario of a head or other office or upon its commencing any business in Ontario or upon the sale in Ontario of any of its securities. This requirement applies not only to Ontario companies, but also to every extra-provincial company, including a Dominion company, and is in addition to any requirements imposed by the laws of the jurisdiction in which the company was incorporated. Substantially similar provisions requiring a company to file a prospectus prior to or upon the sale to the public of any of its shares or securities have been adopted by most of the other Provinces.

The Dominion Companies Act also provides that the securities of a company subject to its provisions shall not be offered to the public by or on behalf of the company unless a prospectus in respect of those securities has been filed with the Secretary of State. The definition of "prospectus" in the Dominion Act has been enlarged to include any written communication offering or indicating that there are available for subscription or purchase or other acquisition any securities (including shares as well as secured and unsecured obligations) issued or to be issued by a company to which the Act applies. The Act also imposes other conditions which must be complied with in connexion with an offer to the public of the securities of a Dominion company. The general object of such conditions is to ensure that every subscriber for securities shall receive a prospectus containing the information prescribed by the Act and that he shall have an opportunity of examining the prospectus before his subscription becomes binding upon him. The requirements of the Dominion Companies Act, however, apply only to an offer to the public of the securities of a Dominion company and only where the offer is made "by or on behalf of the company," which phrase included an offer by an underwriter who subscribes for an issue of securities with a view to making an offer or resale of those securities to the public. The Dominion Act, therefore, has only a limited application.

Subject to the right of the Dominion to impose restrictions which must be observed in connexion with a public offering of securities by or on behalf of a Dominion company, the power to regulate and control dealings in securities within a particular Province is a matter which falls within the exclusive jurisdiction of that Province except in cases involving a breach of criminal law. Jurisdiction in matters relating to criminal law is vested in the Dominion, and a specific act in relation to a transaction in securities may be punishable under the provisions of the Criminal Code, a Dominion statute, if it constitutes a criminal offence. Examples of such offences are the fraudulent conversion of money or of a valuable security received by a person on terms requiring him to account for the same or for the proceeds thereof, or the obtaining of a security by false pretences (which term, as defined by the Code, does not cover representations as to matters other than of *fact*) with intent to defraud. However, experience has proved that, for reasons which need not be discussed here, the provisions of the Criminal Code are not in themselves sufficient to provide any substantial degree of protection to the inexperienced or unwary investor in shares or securities.

With a view to providing safeguards for the investing public which otherwise would be lacking, substantially uniform legislation has been enacted by the nine Provinces, the general purpose of which is to ensure, as far as possible, that the business of dealing in securities shall be carried on only by reputable and proper persons and in a fair and reasonable manner and also to provide certain restrictions and conditions which must be complied with before an offer to the public of any particular security or issue of securities may be made. It is the intention in this article to refer only to the legislation in force in the Province of Ontario ; the corresponding legislation in most of the other Provinces differs from that of Ontario mainly in respect of matters of detail and administration.

The Ontario legislation was first enacted in 1928 as the Security Frauds Prevention Act, 1928. The latter Act was replaced in 1930 by a new Act, which, as subsequently amended from time to time, is the legislation now in force.[1]

The Act establishes a Securities Commission to administer the Act and provides for the appointment of a Registrar and other officials. The Commission and the Registrar are appointed by and hold office during the pleasure of the Lieutenant-Governor in Council. The Commission is vested with very wide powers, including the power, subject to the approval of the Lieutenant-Governor in Council, to make and from time to time amend, alter or repeal Regulations, not inconsistent with the provisions of the Act, providing for the furnishing of information by brokers or salesmen to the public, for the creation of offences under the Act, for the better carrying out of the provisions of the Act and the more efficient administration thereof and for other specified purposes.

The chief objects of the Act are (1) to provide for the registration of persons trading or proposing to trade in securities and to prohibit trading in securities by unregistered persons, except in certain limited cases; (2) to regulate trading in securities; (3) to provide for investigation and action by the Commission in cases where it believes that any fraudulent act or any act which constitutes an offence under the Act or the Regulations has been, is being or is likely to be committed. The Act is of general application and accordingly applies to a transaction in the securities of a Dominion company. In a case decided in 1932 with reference to Alberta legislation, substantially similar in terms to the legislation in force in Ontario and in most of the other Provinces, it was held by the Judicial Committee of the Privy Council[2] that such legislation is within the scope of the provincial legislatures and is not invalid in relation to Dominion companies.

" Security " as defined by the Act and Regulations includes any bond, debenture, share, stock, note, unit or participation certificate, voting trust certificate and any other document constituting evidence of title to or an interest in the capital, assets, profits, earnings or royalties of any individual, association, syndicate or other unincorporated organization or of any company or proposed company and any document constituting evidence of an interest in any option given upon a security.

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[1] The Securities Act, Revised Statutes of Ontario, 1937, c. 265.

[2] *Lymburn* v. *Mayland*, [1932] A.C. 318.

"Trade" and "trading" include any solicitation or obtaining of a subscription to, disposition of, transaction in or attempt to deal in, sell or dispose of a security or interest in or option upon a security for any valuable consideration, and any underwriting of an issue or part of an issue of a security, and also any act, advertisement, conduct or negotiation directly or indirectly in furtherance of any of the foregoing.

"Fraud," "fraudulent" and "fraudulent act," in addition to their ordinary meaning, include, among other things, any intentional misrepresentation by word, conduct or in any manner of any material fact, either present or past, and any intentional omission to disclose any such fact; any promise or representation as to the future which is beyond reasonable expectation and not made in good faith; the gaining or attempt to gain, directly or indirectly, through a trade in any security, a commission, fee or gross profit so large and exorbitant as to be unconscionable and unreasonable, and any course of conduct or business which is calculated or put forward with intent to deceive the public or the purchaser or the vendor of any security as to the nature of any transaction or as to the value of such security.

Registration of Brokers, Security Issuers and Salesmen.—The Act provides that no person shall:

(*a*) trade in any security unless he is registered as a broker or salesman of a registered broker, or

(*b*) act as an official of or on behalf of any partnership or company in connexion with any trade in any security by the partnership or company, unless he or the partnership or company is registered as a broker, or

(*c*) act as a salesman of or on behalf of any partnership or company in connexion with any trade in any security by the partnership or company unless he is registered as a salesman of a partnership or company which is registered as a broker.

With the approval of the Securities Commission a partnership or company may be registered as a broker, in which event the members and officials of the partnership and the officials of the company, other than branch managers or salesmen, may act as such without separate registration. This is subject to the qualification that persons who become members or officials of a partnership or officials of a company after the partnership or company has been registered may not trade in securities until the permission of the Registrar has been obtained.[1]

Notwithstanding the general prohibition against trading in securities by unregistered persons, registration is not required in respect of certain specifically enumerated classes of trades or securities. These include the following: a trade in a security taking place at a judicial sale or at a sale by an executor, administrator or a guardian or committee or at a sale by a liquidator or by an authorized trustee or assignee or a receiver or custodian under the Bankruptcy Act; an isolated trade in a specific security by or on behalf of the owner, for the owner's account, where the trade is not in the course of continued and successive transactions of like character and is not made by a person whose usual business is trading in securities; a trade where one of the parties is a bank or a loan or trust corporation or an insurance company or is registered as a broker under the provisions of the Act; the issuance by a private company of its own securities; the distribution, issuance or sale by a company, exclusively to the holders of its own securities, of stock, bonds or other securities as a stock dividend or other distribution out of earnings or surplus, or in the process of a *bona fide* reorganization of the company, or of additional capital stock where no commission or other remuneration is paid or given in connexion therewith; an exchange of securities in connexion with a consolidation, amalgamation or merger of one company with another company; securities in which trust funds may lawfully be invested; securities of or guaranteed by the Government of Great Britain or any of its dominions, colonies or dependencies, or of or guaranteed by the Government of any foreign country or State.

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[1] The general practice of the Ontario Securities Commission at the present time is to refuse to grant registration to an incorporated company entitling it to trade in securities generally.

The requirements as to registration are primarily intended to apply to brokers, salesmen and other persons ordinarily engaged in the business of trading in securities. They also apply, however, subject to the exceptions mentioned in the Act and the Regulations, to any persons or company doing any act which comes within the general definition of "trading," and therefore apply to a "security issuer," *i.e.* a company or person, other than an individual, trading in securities of its own issue and not trading generally in other securities. Accordingly every company, unless it is a private company or unless the transaction falls within one of the specific exceptions to which reference has been made, which proposes to offer or sell, either directly or through an agent, any of its shares or other securities or to do any act which would constitute trading in its own securities must first apply for and obtain registration as a security issuer.[1] If, however, an issue of securities is being sold outright to underwriters who are registered under the Act and who make a public offering of the securities on their own behalf, and not as agents of the company, the company need not become registered as a security issuer; there must be filed with the Commission, however, full information regarding the company and the security proposed to be offered for sale.

An application for registration must be made in writing upon forms provided by the Registrar, and the applicant may be required to submit further information and material in addition to that called for by the prescribed forms. An applicant for registration as a broker or as a security issuer must furnish, before registration, a bond in the amount of $500. Any applicant or any registered person or company may also be required to furnish a further bond, which usually must be the bond of a surety company, in such form and amount as the Regulations or the Commission may require. New or additional bonds may also be required to be furnished at any time. Any bond so furnished becomes forfeit and the amount named in the bond becomes due and payable upon the filing with the Registrar of a certificate of the Securities Commission that the broker or salesman in respect of whose conduct the bond is conditioned has been convicted of a criminal offence or an offence against the Securities Act or the Regulations and in certain other specified events. The Commission may assign any forfeited bond or deal with any moneys recovered under any forfeited bond in such manner that it will be available to the creditors of the person in respect of whose conduct the bond is conditioned.

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[1] The term "broker," where used in the Act, includes a security issuer unless the context clearly indicates the contrary.

The granting of registration is entirely within the discretion of the Commission. Each application is dealt with separately and the Commission may refuse registration for any reason which it deems sufficient. Registrations must be renewed annually and the Commission has the same wide discretion in dealing with applications for renewal of registration as in dealing with applications for registration in the first instance. All decisions of the Commission with respect to applications for registration or for a renewal of registration are final, and there is no appeal.

A broker or salesman may not hold himself out as having been registered under the Act or advertise his registration in any way except to state to inquirers the name in which such registration stands. A registered broker must notify the Registrar in writing of any change in his or its address for service, the commencement and termination of employment of every salesman and, in the case of a registered broker which is a company or partnership, must also give notice of any change in its officials or members. A registered salesman must likewise notify the Registrar of any change in his address for service and of each commencement and termination of his employment by a registered broker. A salesman is not permitted to trade in any security on behalf of any broker other than his employer without the latter's consent, confirmed in writing.

Regulation of Trading.—The powers of the Commission to regulate trading include not only the power to regulate the activities of persons engaged in trading in securities but also the power, in certain circumstances, to impose conditions which must be complied with before permission to trade in a specific security will be granted.

The Regulations provide that "no broker or salesman shall trade in any security where the whole or any part of the proceeds thereof will be paid either (*a*) into the treasury of the company whose securities are offered for sale, or (*b*) to any person or company allotted or issued such security with a view to resale to the public . . . or (*c*) to any person or company allotted or issued such security for a consideration other than cash, until there has been filed with the Registrar the information prescribed by the Commission from time to time and until the consent of the Registrar has first been obtained." The Regulation does not apply to the sale of a security which comes within the classes of trades or securities in respect of which registration is not required (*supra*) or to securities listed or posted for trading on any recognized stock exchange. It does apply, however, to the common method of corporate financing involving a sale or the granting of an option to an underwriter followed by a public offering by the underwriter, the underwriter in such case having received an allotment or issue of the security with a view to resale to the public.

The nature of the information required to be filed under the foregoing Regulation depends to some extent upon the nature of the security and of the security issuer, *e.g.* whether the latter is an industrial company or a mining company and, if the latter, whether the company is in production or is merely in the stages of promotion or development. In general, it is necessary to file full and complete information regarding the business and properties of the company, its capitalization and financial position, the personnel of its management, the nature of the security proposed to be offered and such other information as the Commission may consider to be requisite in the particular case to enable it to determine whether it is proper that permission for the sale of the security should be granted. In the case of securities to be sold to the public by an underwriter it is also necessary to furnish the Commission with evidence as to the price paid or payable by the underwriter and the price at which the securities are to be offered to the public.

Where the securities to be offered are those of a mining company or of an oil or gas company, additional requirements are imposed. A full and complete report of an engineer who has examined the company's properties must be filed ; evidence must be furnished that the total number of shares issued to vendors of property acquired by the company is not in excess of a certain percentage (usually 33⅓ per cent.) of the company's authorized capital and, except in special circumstances, that such vendors' shares have been placed in escrow for a period which the Commission deems sufficient ; full particulars of all options and underwriting agreements with respect to any shares or other securities of the company must be given. In recent months the Commission has adopted the practice of supplying to the Press full details regarding the terms of all options and underwriting agreements entered into by mining companies, permission for the sale of whose shares or other securities has been granted by the Commission.

The form and terms of all offering circulars and other advertising matter intended for use in connexion with a public offer of a new issue of securities must be submitted to and approved by the Commission before they are used. After the securities have been issued and distributed, however, it is not necessary to submit to the Commission copies of circulars proposed to be sent out by brokers in the ordinary course in relation to the securities in question.

In granting permission to sell or otherwise deal in a security the Commission assumes no responsibility to the public or to any purchaser of such security. Any person who makes any representation to the effect that the Commission has in any way passed upon the financial standing, fitness or conduct of any broker, security issuer or salesman, or upon the merits of any security offered for sale by any broker, security issuer or salesman is deemed to have committed an offence under the Act.

A further Regulation provides that where the whole or any part of the proceeds of a trade in any security will be paid either into the treasury of the company whose securities are offered for sale or to any person or company allotted or issued such security with a view to resale to the public, each purchaser shall receive, at the time of purchase, a written or printed statement setting forth the quantity and description of the security and the consideration, and stating where the purchaser may obtain a copy of the latest prospectus of the company whose securities are offered for sale. Such statement must also disclose whether or not the proceeds of the sale will be paid into the treasury of the company whose securities are being offered and, where the broker or salesman is acting as agent, must state the commission received or to be received from the vendor or purchaser or both. This Regulation does not apply to the sale of a security coming within the exemptions previously referred to or to securities listed or posted for trading upon any recognized stock exchange.

The making of calls, including calls by telephone, at any residence for the purpose of trading in any security (other than Government or municipal bonds and certain other specific securities) with the public or any member of the public is prohibited. This prohibition applies to the making of calls at *any* residence, and thus applies to cases which would not come within a prohibition against " house-to-house " canvassing. The term " residence," however, does not include an office used for business purposes, and the word " public " does not include " close personal friends, business associates or customers with whom the person making the offer has been in the habit in the past of doing regular business in the sale of or obtaining subscriptions for securities."

A broker or salesman is not permitted to make any representation that any security which he offers for sale will be listed upon any stock exchange or that he or any other person or company will resell or repurchase or refund the purchase price of any security offered by him for sale or give any guarantee relating to such security.

The Act and Regulations contain other provisions designed to regulate the dealings of brokers and salesmen with customers or prospective customers. Provision is also made for yearly audits of the books of brokers who are members of or represented upon any stock exchange and for " surprise audits," which may be made at any time without warning or notice. Upon receiving the report of the auditors the exchange is empowered to take such action as its executive committee may deem requisite. A broker who is not a member of or represented upon any stock exchange must file with the Registrar of the Securities Commission annually a certificate as to the financial position of the broker signed by the broker or by two officials or partners of the broker and by an independent accountant. Other certified financial statements may be required to be filed at any time.

Investigation and Action by the Commission.—The Commission is given extremely wide powers of investigation into the books and records, business transactions and affairs of any person or company, whether registered under the Act or not. The exercise of such powers is not confined to cases where any criminal or fraudulent act or any offence against the Act or the Regulations has been or is believed to have been committed or even to cases where there are reasonable grounds for believing that any such act is about to be committed ; the Commission may exercise its powers of investigation and inquiry at any time and in any case in order to ascertain whether any such act or any " wrongful or improper act " or " any act which may be unfair, oppressive, injurious, inequitable or improper to or discriminate against " any present or prospective holder or purchaser of any securities of the person or company under investigation, or any present or prospective creditor, or " any act whereby any unfair advantage may be secured by any person or company over any other person or company," has been, is " or is likely to be " committed. As incidental to its power of investigation and inquiry the Commission and its representatives are given the power to summon and enforce the attendance of witnesses and to compel them to give evidence and produce documents and records. The report made with respect to an investigation, including the evidence, findings and any comments or recommendations, may be published in whole or in part.

The provisions referred to in the last preceding paragraph were carried into the Act in 1937, and are much wider than the provisions previously in force in Ontario and the provisions which are still in force in most if not all of the other Provinces. Under the amended provisions the Commission is given what is in effect an uncontrolled discretion and power to determine whether or not an investigation in any particular case is justified and also to determine whether or not any specific acts or dealings are or may be " fraudulent," " wrongful," " unfair," " oppressive," " injurious " or " inequitable," as the Act provides that no action shall lie or be instituted against the Commission or its representatives in respect of any act or omission in connexion with the carrying out of the provisions of the Act. There is also a special provision to the effect that no action shall lie against the Commission or its representatives in respect of any act or omission in connexion with or arising out of any investigation or inquiry.

Where the Commission or its representative upon investigation finds that any fraudulent act or any offence against the Act or the Regulations has been, is being or is about to be committed, the Commission may suspend from registration for a period not exceeding ten days any registered broker, company or salesman in its opinion concerned therein, and also any other registered broker, company or salesman connected with the same organization. In cases where the Commission considers suspension for such period to be inadequate, or where in its opinion any unregistered broker or company is concerned in such act or offence, it may apply to a Judge of the Supreme Court for an order restraining such person or company from trading in securities generally or from trading in specific securities or from committing any specific act or series of acts absolutely, or for such period as may be specified in the order. The Commission also has power to suspend or cancel the registration of any registered broker in the event of his bankruptcy, or upon the suspension of the broker or his representative from any stock exchange, or upon the institution of criminal proceedings against the broker or any of his officials or his or their conviction of an offence against the Act or the Regulations.

The Act also contains provisions entitling the Commission to place a " stop order " against any funds or securities belonging to any person or company whose affairs have been, are being or are about to be examined under the Act or against whom the Commission is about to apply for or has applied for or obtained an injunction or against whom criminal proceedings which, in the opinion of the Commission, are connected with or arise out of any security or trade in a security or out of any business conducted by the accused, have been or are about to be instituted.

Every person, including any officer, director, official or employee of a company, who is knowingly responsible for the commission of any offence under the Act or Regulations or for any fraudulent act not punishable under the provisions of the Criminal Code, is made liable upon summary conviction to a fine or to imprisonment or both. The constitutional validity of this provision has been questioned on the ground that the provision encroaches upon the exclusive legislative power of the Dominion in the field of criminal law. It has been held, however, that even if the provision is properly to be regarded as invalid it is clearly severable from the other provisions of the Act.

Co-operation among Provinces.—The jurisdiction of the Securities Commission of any Province extends only to acts done or securities offered for sale or otherwise traded in within the territorial boundaries of that Province. In any case where a broker or other person desires to trade in securities in more than one Province or where an issue of securities is to be offered for sale in more than one Province, the requirements of each Province in which such trading operations are to be carried on or in which such securities are to be offered for sale must be complied with. However, considerable progress has been made towards bringing about a measure of uniformity in the requirements of the various Provinces, particularly with respect to the material which must be filed as a condition precedent to the granting of permission for the sale of a specific issue of securities. The result is that substantially the same material which has satisfied the Securities Commission of the Province in which the business or principal business of the issuing company is carried on will be accepted by the other Provinces in which the securities are to be offered for sale, although in some cases it may be necessary to supplement such material in certain respects.

The Securities Commissions of the various Provinces also co-operate in taking steps to prevent or restrain the commission in one Province of acts which result in a violation of the securities legislation of another Province. For example, a broker resident in Ontario who is not registered under the Securities Act of the Province of Quebec but who circulates advertising material by mail in Quebec or sells securities over the telephone to customers in Quebec, is not subject to the jurisdiction of the Quebec Securities Commission, although his acts may constitute " trading in securities " in Quebec. In such a case, however, the Quebec Securities Commission may lodge a formal complaint with the Ontario Securities Commission, which thereupon will warn the broker that the acts complained of must be discontinued ; if this warning is not complied with, the broker's Ontario registration may be cancelled.

The suspension or cancellation of the registration of a broker in one Province, and the reasons therefor, may also be reported to the proper authorities in any other Provinces in which the broker is registered for the purpose of enabling them to take such action as they may think fit.

In recent months plans have been made for the establishing of a central bureau for the collection and distribution of information relating to promotions and sales of securities and the activities of persons engaged in trading in securities anywhere in Canada. Reports will be made to this bureau of all suspensions and cancellations of registrations or other action taken by the Securities Commission of any Province, together with all relevant data. All material on file with the central bureau will be made available to the proper authorities in each of the other Provinces. The Department administering the Dominion Companies Act has agreed to co-operate with the Provinces in the setting up of the proposed bureau and also with regard to all matters relating to the securities of Dominion companies which come within the jurisdiction of that Department.

Conclusion.—It is not within the scope of this article to attempt to examine the operation in practice of the existing securities legislation in Canada or to analyse in detail its relative merits or demerits. There would seem to be little doubt that, upon the whole, the legislation has operated to the benefit, not only of the public at large, but also of the large class of reputable brokers and security dealers whose aim is to deal fairly with their customers and with the public generally. However, numerous criticisms on various grounds have been directed at the Act and the Regulations and also at the practical administration of their provisions, and some at least of these criticisms would appear to be well founded. Exception can properly be taken, in the opinion of the writer, to those provisions of the Act which confer upon an appointed and non-judicial body, which in the conduct of its investigations is unhampered by legal rules relating to evidence, what is practically an unlimited and uncontrolled power and discretion to make decisions of a judicial or quasi-judicial nature, which are not subject to review by the courts. It is not suggested that there should be a right of appeal from the decisions of the Commission in regard to purely administrative matters. The decision as to whether it is proper for a particular security or issue of securities to be offered to the public or with respect to the formalities and restrictions which must be complied with as a condition precedent to the making of such an offer would properly fall within the class of matters in respect of which the decision of the Commission ought to be final. On the other hand, decisions or rulings which, for example, have the effect of depriving a person of the right to engage in his chosen business or calling, or which profess to determine whether or not a particular act is fraudulent or an offence against the Act or the Regulations, are, it is submitted, decisions from which the persons concerned should be allowed the right to appeal to the courts. It is difficult to see how the recognition of a right of appeal in such cases would in any way hamper the proper work of the Commission or the carrying out of the objects for which the Act was designed.

Furthermore, in view of the fact that the Commission is responsible to and holds office only during pleasure of the Government of the day, there is a danger that the arbitrary powers conferred by the Act may be utilized for the purpose of achieving objects very different from those which the legislation was originally designed to accomplish. In this connexion reference may be made to those provisions (*supra*) whereby the Commission is empowered to make an investigation of the business transactions and affairs and the books and records of *any* person or company in order to ascertain whether " any wrongful or improper act . . . or any act whereby any unfair advantage may be secured by any person or company over any other person or company " has been, is being or is likely to be committed. Such an act, actual or suspected, may afford the basis or excuse for an investigation, notwithstanding that it may have no relation to securities or dealings in securities. The statute places no restrictions upon the use which may be made by the Commission or by the Government of information obtained in the course of or as a result of such an investigation.

It is not intended to suggest that up to the present time there has been any misuse of the wide inquisitorial powers so conferred. However, the possibility of such misuse cannot be ignored. In any event, the statutory provisions in question illustrate the lengths to which the delegation to a departmental authority of the power to interfere with civil rights and privileges can be carried.

COMPARATIVE LAW AND THE TEXTBOOKS.

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AMONG the many problems which the rise of the science of comparative law has presented to legal scholars there is one which is of the greatest importance for the actual influence and for the reputation of this branch of legal research among legal practitioners : the question how the results of Comparative Research Work can best be made accessible to the legal public. Monographs and essays in learned periodicals will always reach only a very limited circle, and the same applies to university lectures and to papers read before learned societies. However valuable these efforts may be, they will scarcely be able to make large groups of legal practitioners acquainted with the methods and results of comparative research and, above all, with the immense advantages which comparative jurisprudence can offer even for the solution of the problems of an everyday practice. It has been said that many lawyers are inclined to regard a comparative lawyer as a man who knew no law well and least of all the law of the country whose degree he possessed. It is to be hoped that this belief is wrong. But if it is and if on the other hand it is true that it is more or less widely held, an attempt ought to be made to provide for a better publication of the results of comparative research and of the ways and means by which these results are achieved. This task cannot be solved by essays, monographs and scientific journals. It cannot even be achieved by textbooks devoted solely to comparative research—at least not as long as comparative law is not a recognized subject of legal education. If it is desired to provide for comparative jurisprudence that amount of publicity and influence which it deserves, it will be necessary that ordinary legal textbooks—or at least some of them—open their gates to the main results of comparative research.

Many legal works in all countries devote themselves entirely to the national law which they serve. This probably will always continue to be so. Especially the typical practitioner's compendium, which aims at reproducing judicial decisions as completely and correctly as possible in a limited compass, will find it outside its ambition to include references to foreign laws. In case of such works all that could be hoped for would probably be a bibliography giving access to foreign or comparative works to those who are desirous of information on foreign laws. It is, however, different with two other types of legal textbooks : the students' handbook and the scientific treatise. The development of comparative jurisprudence has not left these two types uninfluenced. Everywhere, *i.e.* in all countries and in all branches of the law, textbooks of this kind contain comparative remarks. Unfortunately, however, such remarks are in most cases unsystematic and casual, and even where an attempt is made to introduce references to foreign laws as a regular feature into the book, the achievement lags often far behind the good intentions.

We may be allowed to quote a few examples from prominent English textbooks to prove the correctness of this statement. It would have been easy enough to collect similar examples from non-English legal literature,[1] and the following remarks are in no way meant to describe English textbooks as particularly black sheep or to subtract anything from the well-known merits of those highly eminent writers who are responsible for the undermentioned deficiencies.

Sir M. D. Chalmers always strenuously endeavoured to draw the attention of his readers to the corresponding provisions of foreign law. The references to foreign law in his *Digest of the Law of Bills of Exchange* and in his *Commentary on the Sale of Goods Act* have, however, never been brought up-to-date, neither during his life-time, nor later by the several learned editors. The result is that in the latest edition of his work on the *Law of Bills of Exchange*, published in 1930, the only standard work on French law to which reference is frequently made is the fourth edition of Nouguier's *Lettres de Change et Effets de Commerce*, published in 1875 ! The fact that the Statute relating to Bills of Exchange in Germany has been republished in 1908 and that various alterations were made, especially with regard to the provisions relating to the form of protests, has not been noticed. On American law the only authority which is frequently quoted is the 4th edition of Daniel's *Negotiable Instruments*, published in 1891. No reference is made to any of the well-known comprehensive comparative works on the law of Bills of Exchange by F. Meyer, Magnus, etc. In the preface to the 3rd edition of 1883 which is reprinted in all the following editions, the English law as to Bills of Exchange is contrasted to Continental laws in a way which at least at the present time and in so far as the statement on Continental laws is concerned, can only be described as misleading

Similarly in Sir M. D. Chalmers' edition of the *Sale of Goods Act*, 1893, reference is frequently made to French and Italian law, but the writers on French law who have been quoted are, without exception, classics such as Pothier, Domat, etc., and in more than one case their statements can by no means be taken as expressing the views held by contemporary French lawyers. In a note on s. 2 of the Act reference is made to the distinction in " the Continental codes " between traders and non-traders. But this distinction, which is by no means to be found in all Continental codes, has nothing to do with the capacity to buy and sell with which Art. 2 deals, and the reference to Art. [sic !] 7 of the German Code is completely out of place.

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[1] To mention one especially grave case : Colin et Capitant in their otherwise excellent textbook of French private law speak of the English common law as " une masse non coordinée d'anciens statuts dont plusieurs remontent à des siècles, qui parfois se contredisent les uns les autres et dont le juge ne sait pas toujours avec certitude s'ils sont demeurés en vigeur ou s'ils doivent être regardés comme perimés." (7th ed. 222 p.). It comes as a surprise that in France, where much labour and thought is given to studies in English and American law, such a statement should pass unchecked through so many editions of so widely read a book.

Russell *On Arbitration and Awards* (13th ed.) contains an appendix dealing briefly with foreign laws. In the section on German law it is stated that foreign awards are enforceable in Germany by the court on certain conditions mentioned in the law of Civil Procedure. No mention is made of the deep inroads on the enforceability of foreign awards by the German rules as to exchange restrictions, especially by § 40 of the Law of February 4, 1935, which have rendered the Geneva Protocol of 1923 and the Geneva Convention of 1927 as well as the rules of the Code of Civil Procedure virtually obsolete.

In Salmond-Stallybrass *On Torts* (9th ed.) " it is submitted that the French doctrine of *le risque créé* will help us to understand the rule in *Rylands* v. *Fletcher*, and that the principle underlying that rule is that if a man takes a risk, which he ought not to take without also taking upon his shoulders the consequences of that risk, he must pay for any damage that ensues." Readers of this statement of French law are left under the impression that the doctrine of *le risque créé* actually forms part of French law. In reality this doctrine, although it has influenced French legislation during the latter part of the nineteenth century and has been approved of by a number of prominent writers, has not been accepted by the majority of learned authors, and the French courts, although recently their opposition has greatly decreased, have never openly recognized it as a rule fit to govern the interpretation of the civil code.

Still more objectionable is another remark in the same eminent textbook. Commenting on *accessio*, *specificatio* and *confusio* the learned author says : " The modern Continental codes have largely abandoned the conclusions of Roman law, but the rules established in substitution are so vague and unsatisfactory as to lead irresistibly to the conclusion that English law is wise in treating the matter as one for the exercise of judicial discretion and not for the application of fixed principles." Reference is then made to the French Civil Code, Art. 565–577 and to the German Civil Code, §§ 946–952. It is, of course, entirely a matter of opinion whether one finds these provisions satisfactory or not. But that they can be called vague appears to be surprising. As far as the German rules are concerned it has perhaps been overlooked that the term " *wesentlicher Bestandteil* " in § 946 has been explained at considerable length in §§ 93–96 BGB. The whole statement would scarcely allow any reader to suspect that French law lays down the principle (Art. 565) that as far as movable property is concerned " *le droit d'accession est entièrement subordonné aux principes de l'équité naturelle.*"

In that classical textbook, Anson's *Law of Contracts* (18th ed.), a dictum in *Mayor of Ludlow* v. *Charlton* 6 M. & W. 815 is quoted which reads as follows: "Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate is a necessity inherent in the very nature of a corporation." How many generations of Anglo-Saxon lawyers may, by this quotation, have been imbued with the idea that every modern corporation under any modern law, or at least under most modern laws, must have a seal or "some substitute for a seal?"

Very misleading is the summary of views of German legal writers to be found in the 9th edition of Sir John Salmond's *Jurisprudence* (p. 294). The learned editor refers here to Stammler's *Handbuch des deutschen Rechts* "for the close resemblance to a trust fund of the *Stiftung*, considered by itself, and to an English corporation when considered from the point of view of the *Stifters*, who administer it." This reference includes a whole series of errors. In German law the term "*Stiftung*" is used for two quite distinct legal institutions which although they serve similar economic purposes have from the point of view of analytic jurisprudence little connexion with each other. *Stiftung* in the first sense denotes a fund which is transferred to an already existing legal person with directions as to its use. *Stiftung* in the second sense is a newly formed legal person—not an association of human beings—administering certain funds. It is a *Stiftung* in the first sense which Prof. Jung (not Stammler himself) compares to a trust, while the *Stiftung* in the second sense is compared (not perhaps very happily) to a corporation. Nowhere does the German author mention a *Stiftung*, "considered by itself" and still less one which is "considered from the point of view of the *Stifters* who administer it"—for the simple reason that the *Stifters* under German law do not administer the *Stiftung* at all. The learned author then adds that according to the well-known German textbook on Civil Law by Enneccerus the *Stiftung* has become a manifestation of a brotherhood. This really shocking extension of that now only too fashionable concept of *Gemeinschaft* is fortunately not to be found in Enneccerus' work. Enneccerus denies that the *Stiftungs-fund* is itself clothed with legal personality and states that it is not the fund which is administered, but the organization administering it to which legal personality has been granted. The learned editor's remark that the Roman notion of *familia* has grown to strange heights in the German doctrine of *Stiftung* is therefore hardly appropriate if applied to the sound common sense taught by Enneccerus.

Textbook learning has a deeper influence on the building-up of the general views which lawyers acquire and continue to hold than is generally supposed. That is especially true if this learning refers to problems on which the individual practitioner can acquire but a limited experience. Wrong statements on foreign law in students' textbooks are therefore inclined to become deep-rooted prejudices. The very eminent English advocate who strenuously refused to believe that there existed a system of law which did not recognize either the doctrine of consideration or something similar to it, is an example of this onesidedness of our legal education. But even this " insularity " is surpassed by that of a Continental judge, who held that the rules as to vindictive damages did not form part of English law and were merely the expression of a more or less irresponsible whim, which seemed to befall some English courts for inexplicable reasons in a number of cases !

It might be said that the task of introducing students to the elements of comparative law goes beyond the natural limits which are set to students' textbooks. It is indeed impossible to teach students who are just about to learn their own national law rules of foreign laws, which are of infinitely smaller importance to them than their national law necessarily must be. It would be utterly futile to ask authors of students' textbooks to double the size of their works by including long excursus or appendices or notes dealing with the respective parts of foreign law. Any increase of the mass of details which students have to learn to pass their examinations would doubtlessly be the most undesirable consequence of the new learning in comparative law. But from this it does not follow that a thorough expurgation of wrong statements on foreign laws and of overstatements on the national laws is the only thing which can be done at present.

To be a comparative lawyer does not mean only or mainly knowledge of several systems of law : to possess the knowledge of a greater number of legal rules may be desirable, but it is not a scientific achievement. The immense value of comparative research consists in widening the general outlook, sharpening the sense for justice and equity, improving legal methodology and, above all, enabling lawyers to achieve a truer and better appreciation of their own national laws. It may be that it results sometimes in a more critical attitude towards the *individual* national laws ; but this disadvantage, if it is one, is but the necessary companion to that indisputable advantage : the formation of means of comparison which alone make appreciation just and give criticism that much-needed basis which, apart from comparative studies, only long years of experience can offer. If this is conceded it follows that a student's textbook has fulfilled its task, insofar as comparative law is concerned, if it has given its reader a few fair examples of comparative jurisprudence. It is neither necessary nor desirable to add a running commentary on all sorts of foreign laws to the text dealing with the national law. But where problems of importance and interest are dealt with at greater length a reference to foreign laws will be found to be of the greatest value if it is correct in itself and does not confine its rôle to a mere mechanical noting of divergences or similarities, but summarizes with sufficient clearness the reasons by which foreign laws have arrived at their respective results.

How much can be achieved in this direction has been shown by a select number of eminent textbook writers of whom only a few can be mentioned here. The list is properly headed by a French name: in France earlier than in other countries attention has been given to the study of comparative law and—what is not quite the same—to the publication of its results in readily accessible form. The student of *droit civil* who is fortunate enough to direct his first steps in the new science to Professor Planiol's famous three-volume textbook will find there, besides a lucid introduction to French law, a complete list giving the dates of publication and some other details regarding nearly all the more important foreign codifications of "civil law" (in the Continental sense of this word) together with a short bibliography, which is at least sufficient to show him the entrance door to independent research. In addition, he will find references to foreign law sparingly, but wisely, dispersed through all the three volumes. The table of the grounds of divorce under some foreign laws, *e.g.* which is offered in Volume I, will not only stimulate his interest in this thorny problem, but may prove to be of some use even later on in his practice for such *prima facie* information as is not infrequently wanted and is so seldom found in an equally well prepared form.

Similar is the treatment of foreign laws in another Continental student's textbook which has served many generations of Austrian lawyers and would have continued to do so, had not the *force majeure* of recent developments brought its career to an untimely end. I venture to submit that Ehrenzweig's *System des bürgerlichen Rechts* in four volumes is, perhaps, the best general treatise of private law in the German language, and ought to be better known to English lawyers interested in comparative law than it actually is. The work contains, of course, no attempt at a systematic treatment of comparative law. But the numerous notes on foreign law are without exception interesting to beginners and advanced law students alike. Thus, students of the law relating to interpretation will be interested to learn that when the Austrian Civil Code was in preparation a proposal was made that a provision should be inserted into the code corresponding to the well-known rule of English law *verba ita sunt intelligenda ut res magis valeat quam pereat.* The proposal was, however, unsuccessful in the end because the rule was found to be so trivial as not to deserve being mentioned in the code! The rule of *verba fortius accipiuntur contra preferentem* is, however, to be found in the Austrian code and was already part of the Codex Theresianus of 1766.[1] It will not be denied that Austrian students will be helped—or rather, will have been helped—in the study of their own law by being taught these rules of English law which have not found an equally elegant formulation in Continental law.

Should it, however, still be thought that comparative remarks are too much of a burden for a mere student's textbook, conclusive evidence to the contrary would be given by Prof. R. W. Lee's excellent *Introduction to Roman-Dutch Law.* The writer of these lines, who has had the valuable, but somewhat exasperating, experience of sitting for legal examinations on the Continent as well as in this country, has to confess that there are few, if any, student's textbooks which when being studied could equal this book in attractiveness and which, when laid aside, left the reader under a deeper debt of gratitude for the vast amount of information conveyed to him in a surprisingly small compass, and for valuable stimulation to further thought and research into its subject. In the preface to the third edition of his work the author expresses his surprise that Roman-Dutch law is now being studied by so many candidates for the English Bar, who have no intention of practising in any country where this law is actually administered. The explanation is undoubtedly partly to be found in the fact that thanks to this eminent work the study of Roman-Dutch law is found to be much easier than could be presumed, having regard merely to the many complexities and difficulties arising from the state of its sources, and the multiplicities of legislation in the different countries where Roman-Dutch law is actually in force. This result, however, is not only not impeded by the introduction of carefully selected remarks on comparative law—it is in fact at least partly due to them. This is obvious as regards the many comparisons with rules and institutions of English, Dutch, Germanic and Roman law. But few readers will deny that their interest has been stimulated too by references, which were not as obviously called for by the peculiar nature of Roman-Dutch law, viz. the few, but well selected remarks on contemporary Continental laws.[1]

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[1] Ehrenzweig, vol. i, pp. 246 and 247.

It would be easy to add further examples of other successful attempts to introduce students to comparative jurisprudence by works other than those which are expressly meant for the use of readers who are sufficiently interested to resort to works professedly dealing with comparative jurisprudence. Of works of the latter category there is no lack, neither in this country where works like Walton and Amos's valuable *Introduction to French Law* and Buckland and McNair's admirable *Comparison of Roman and English Law* have given a new lead, nor abroad where everywhere active centres for the study of comparative law have been formed whence a permanent stream of comparative literature issues. But notwithstanding all these endeavours, comparative research has remained here and abroad a matter attempted by, and interesting to, comparatively few members of the profession.

The educational problem which this state of affairs offers is essentially different in the different countries. Countries like Switzerland or Holland where languages and nationalities mingle and international transactions are of everyday occurrence are in a better position than others where such external stimuli are missing. And in the Anglo-Saxon countries the problem is, of course, entirely different from that in countries using Continental laws.

Notwithstanding that successful attempts may have been made to interest Anglo-Saxon students in selected questions of foreign law such as *e.g.* those of the relation of cause and consideration, Continental forms of land registry, questions of the law of bills of exchange, of the constitution of courts and of the problems of administrative law, they will never be able to replace what is in most cases so sadly missing : a sound grounding in the elements and methods of modern Continental laws. If attempts to unify internationally important parts of the law, especially of commercial law, have proved again and again to be far less successful than was anticipated, the reason is at least partly to be found in the mutual neglect to receive a grounding in Anglo-Saxon legal methods on the part of Continental lawyers, and to become acquainted with Continental basic rules on the part of the profession here and in the U.S.A.

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[1] See *e.g.* on pp. 35, 225, 323, 434 *et seq.*, 438.

It is not the object of these lines to suggest a solution of this problem as it presents itself to Continental countries. The Anglo-Saxon legal system is undoubtedly much more difficult to learn and to understand than any other living legal system. If therefore an Anglo-Saxon lawyer goes about to acquire some knowledge of the fundamentals of Continental laws, his task is considerably easier than that of his Continental brother when studying the elements of English law. And in addition the English lawyer who becomes interested in foreign laws can rely on a most valuable assistance in the form of his knowledge of Roman law. Notwithstanding the great forces which have undermined the influence of Roman law on the Continent during the nineteenth century and have redoubled their strength during the twentieth century, especially in Central Europe, Roman law is still the mother of all Continental laws, with the sole exception of the laws of Scandinavia. Even the modern opposition to Roman law fights Roman law with the weapons of conceptions, notions and arguments which could never have been developed but for the influence of Romanism.

There is, of course, a vast difference between Roman law and its modern successors. This difference is much greater if by Roman law classical law is meant—not Justinian's law. Nowadays under the inspiration of modern Romanist research all textbooks of Roman law lay the main stress on the classical law as restored by recent research, and the enthusiasm of the legal historian for the classics will at least in some cases lead to the result that students acquire a much more thorough knowledge of classical than of Justinian's law, which from the point of view of comparative studies in modern laws is not wholly desirable.

Is it not possible to make the study of Roman law more fruitful for the purposes of comparative jurisprudence than they have so far been? The attempt to make Roman law serve as an introduction to contemporary modern laws has been made several times in non-English literature and legal education. Sohm's famous *Institutes of Roman Law* owe their success in Germany and other countries not least to the fact that they deal with Roman law more or less on the lines of the German BGB and that the main topics of that once much admired and now often unjustly criticized code are dealt with as being the end to which the historical development from Roman law has for the time being led. It might perhaps be possible by a concentration on the basic elements of contemporary laws to avoid the limitation of such treatment to just one modern legal system without at the same time passing the limits which must be set to any student work. Sherman's *Roman Law in the Modern World* has attempted to lead student readers from Roman law to modern laws, and if the attempt has not been in every respect successful, it deserves attention and respect for the labouring work which it involved and the courageous idea which underlies it. In a smaller compass Prof. Mackintosh's *Roman Law* in the modern practice combines the teaching of Roman law with an introduction to some rules of modern Scots law. Similarly in a number of Continental universities lectures on " Roman law as an introduction to modern comparative jurisprudence " will be found announced from time to time, while the Council of Legal Education in this country combines instruction on Roman law with that in the main doctrines of jurisprudence.

It might be said in objection that Roman law is a very complex subject and that with the comparatively short time which is available for it in the present curriculum it is difficult enough to give students an adequate idea of Roman law proper. This is undoubtedly true, and if Roman law is to be used as the basis of an introduction to modern comparative law in some form, on which more can perhaps be said on another occasion, it will be necessary to increase the time available for Romanist studies. It is, however, submitted, that such sacrifice will be found to be sufficiently useful to be worth a trial. It cannot be denied that it is hard for many students to-day to find a psychological link between their studies on Roman law and those in modern law. The result is the widespread complaint, that whatever has been learnt in one's youth in Roman law was quickly forgotten when the examinations have once been happily passed. It is respectfully submitted, that as things are to-day—not only in this country, but in many other countries as well—the study of Roman law is from the point of view of the student more or less isolated from the rest of his studies.

This fate of Romanist studies is entirely undeserved : the brilliancy of historical research of modern Romanists, the importance of the results of their studies and the great progress in the historiography of Roman law alike deserve to be better known than they are to-day. But lawyers are not primarily historians and those are not the worst ones among them who are above all interested in those aspects of legal science which deal with the law as a living force. If the study of comparative law helps to liberate Roman law from the—as I believe, not " splendid "—isolation in which it stands at present in the curricula of our law schools, that in itself might be a result, justifying comparative legal studies.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L., LL.D.]

The Agreement with Eire.—After the formal recognition by the United Kingdom of the validity of the Constitution of Eire, despite its departure from the terms of the Irish Treaty of 1921, the way was laid open for the conclusion of an accord on the one vital issue affecting Irish status left outstanding. Mr. de Valera had always regarded as open to grave objection the terms of Arts. 6 and 7 of the agreement of 1921, on the ground that their existence precluded the Irish Free State from asserting a claim, in the event of a British war, to have her neutrality respected by the state with which the Crown was in conflict. The new agreement of April 25 removes this disability by cancelling the Articles in question and providing for the transfer to Eire of the Admiralty property and rights at Berehaven and the harbour defences at Berehaven, Cobh and Lough Swilly not later than December 31, 1938. The surrender is unconditional; though Mr. de Valera's view is that Eire would never allow her territory to be used as a base of operations against Great Britain, no formal engagement to that effect is included in the agreement. The recognition of the unfettered sovereignty of Eire, and her right to be neutral in a British war, may thus be held to be complete.

The Dominions and the League Covenant.—The decision of the British Government to invite examination by the Council of the League of Nations of the question of the consequences arising from the existing situation in Ethiopia, elicited at the Council meeting in May a statement by the representative of New Zealand deprecating any action contrary to the principles of the Covenant or any condonation of acts of aggression. The Dominion held that, if recognition of the Italian conquest of Ethiopia were to be accorded, it should be under a general resolution of the League and not by separate decisions by individual members, nor could the Dominion support any proposal which would involve, either directly or by implication, approval of a breach of the Covenant. No formal decision was taken on the issue, but it was made clear that the majority of members of the League felt free to decide individually their attitude, though no precise answer was given to the difficulties pointed out by New Zealand. In accordance with recent practice the agreement of April 16, with Italy, makes no provision for its application to the Dominions, nor have the Dominions been associated in the subsequent steps taken to secure, if possible, the acceleration of the withdrawal from Spain of "volunteers" from other states. On the other hand, information regarding British action is, in accord with the procedure approved by the Imperial Conference, regularly communicated to the Dominions. Both in Canada and the Commonwealth there has been marked reluctance to discuss in Parliament the issues involved, and these Dominions have refrained from comment on the matters of which they have been kept informed. Such an attitude is doubtless inevitable. The position of Eire is in a slight measure different from that of the other Dominions, as Eire has accepted the non-intervention agreement from which the others have remained aloof.

A Commonwealth Foreign Policy.—Mr. R. G. Menzies, Attorney-General of the Commonwealth of Australia, in his farewell message to the United Kingdom on his departure on the conclusion of his mission to discuss, in conjunction with Sir Earle Page and Mr. White, economic relations, stressed the importance of active co-operation between the Dominions and the United Kingdom in foreign policy.[1] He stressed equally the obligation of the British Government to consult the Dominions and to determine policy after full consideration of their views, and the duty of the Dominions to contribute positively to the formation of policy. He insisted on the necessity of the closest relations between governments, and this attitude was contemporaneously reinforced by Mr. Hughes, who is in charge of the portfolio of external affairs. Mr. Hughes, in a manner reminiscent of pre-War days, attacked the Dominions Office as an anachronism like a muzzle-loading rifle or a hansom cab. It appears that in his view delay has occurred in transmission of messages on foreign affairs from the Foreign Office, because such messages are transmitted through the Dominions Office to the extent at least of their being cyphered therein. It was suggested that messages might come to the Commonwealth directly from the Foreign Office or the Prime Minister without use of the Dominions Office. The Premier, however, immediately made it clear that in principle there was no fault to be found with existing arrangements, though the intervention of the Dominions Office might occasionally delay communications. It is not apparently suggested that the Dominions Office now does more than send on exactly what is prepared in the Foreign Office ; the older practice of revision is understood to have been abandoned. Messages must be cyphered in some department and there need be no delay worth consideration if the work is done in the Dominions Office. For the rest the attack on the Dominions Office ignores the convenience of having a minister responsible for co-ordinating communications to and from the Dominions, though no doubt the work could be assigned to the Prime Minister's Secretariat, and ministerial assistance could be given to the Prime Minister to relieve him in minor matters. Vital issues, of course, already fall to him to determine with Cabinet approval where requisite. But the real difficulty no doubt does not lie in mere matters of communication. Canada, the Union of South Africa, and Eire, for reasons which to them seem sufficient, do not desire to take part in framing foreign policy in matters not immediately concerning them ; in Australia itself there is wide divergence of view between the Government and the Opposition as regards their attitude towards foreign policy.

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[1] *The Times*, August 9–10, 1938.

British Representation in New Zealand.—On the other hand, New Zealand has shown much readiness to comment on British policy; and to ensure more complete personal contact, the British Government has taken the initiative in securing the consent of the Dominion Government to the adoption of the system in force in Canada, the Union and Australia under which the Governor-General ceases to act as agent of the British Government, his place being taken by a High Commissioner, while the Governor-General acts solely as representative of the King.[1] The change was not asked for by the New Zealand Government, and the late Governor-General would not have welcomed the proposal if made in his time. The change, of course, must detract from the position of the Governor-General and will render the office unlikely to be accepted by men of Parliamentary experience. But no doubt it is commended by the consideration that, where there is divergence of view between the two governments, it is undesirable that the representative of the Crown should be brought into the possibility of friction with ministers. At any rate the wise choice of the first incumbent of the office affords every ground for expecting that the new arrangement will have satisfactory results in cementing relations between the governments, and strengthening the desire of New Zealand to play its part in the devising of imperial foreign policy. There has been some criticism by the Opposition in Parliament of the Government's action in disagreeing in some measure with the British point of view, but the ministry has rightly insisted that it is right and proper for the Dominion point of view to be plainly put, even if, as is inevitable, New Zealand must acquiesce in the final British decision.

The Union of South Africa and the National Anthem.—Very interesting issues were raised by the episode of the playing on Union day, at the military parades which marked the occasion, of the Dutch anthem " Die Stem van Suid Africa " to the exclusion of the British National Anthem. The position was strongly challenged by the opinion of the English-speaking elements in the Union, and prolonged delay in any ministerial explanation led to the threat of resignation by Mr. Stuttaford. The matter was then taken up seriously by the Government in view of the unrest in the ranks of its own supporters, the attacks of Nationalists and the protests of the Dominion party. Ultimately on July 29, Mr. Pirow, who, as Minister of Defence, accepted full responsibility for the orders given, explained his action, both as regards the anthem and the taking down of the Union Jack at Pretoria, an act which had naturally caused deep resentment. As regards flags the position is that under regulations the flag of the defence force is the Union flag alone, and it alone can be flown on defence property. Outside such property both can be flown, and in the case of Natal both are used on defence property by special regulation. The hoisting of the Union Jack at Pretoria was an error of an officer who was accustomed to the Natal procedure. As regards the British National Anthem, the regulations forbade the playing of "God Save the King" where troops were present in uniform save as a royal salute, and in the absence of the Governor-General such playing was impossible. The fact that "Die Stem" was played showed that it was not a national anthem. This ingenious argument was perhaps less effective in solving the problem than the statement of the Prime Minister and Cabinet[1] that there was no national anthem for the Union, and that "God Save the King" and "Die Stem" would in future both be used or neither. This declaration, it will be noted, settles a point hitherto in dispute. It is clear that the national anthem of the Cape of Good Hope and Natal before union was the British National Anthem, and the same thing would appear to have applied to the Transvaal and the Orange River Colony as argued in the Assembly by Mr. Blackwell. Hitherto it has been assumed, as the Dominion party claimed, that the national anthem of the Union was taken over from the colonies, but the Government has now decided against that view. On the other hand, it was made clear that it was not the intention of the ministry to insist on adopting "Die Stem" as the national anthem without general accord. The decision has not been regarded with full approval in English-speaking circles, in which a petition has been signed asking for true equality as regards the use of the Union Jack and "God Save the King," while the Nationalists have deprecated any use of either as incompatible with the ideal of South African unity. At the swearing-in ceremony before the opening of Parliament, the Nationalist members made an affirmation in lieu of the usual oath of allegiance to the King.

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[1] *The Times*, July 28–29, 1938.

The Extent of the Royal Prerogative in the Colonies.—The decision of the Judicial Committee in *Sammut and Another* v. *Strickland*[2] is remarkable for dealing with points, not hitherto disposed of by judicial decision, in a manner asserting in the most definite way the widest extent of the royal prerogative. The fact is interesting historically, for it reminds us that, when the Long Parliament insisted on depriving the Council of its judicial power to enforce the Crown's claims of prerogative legislation and taxation, it confined its action to the Council's authority as regards England, and left the King in Council the guardian and interpreter of the prerogative in its application to the oversea territories of the Crown, an early assertion of the doctrine that Englishmen overseas are not entitled to the liberties of those dwelling in the Commonwealth.[3] Some surprise was expressed in legal circles in Malta that the Lord Chancellor

[1] June 2 and July 26; *Cape Times*, July 27, 1938. To gratify Nationalist sentiment "God Save the King" will not be played at the Voortrekker centenary celebration in December, 1938.

[2] 54 T.L.R. 1080.

[3] It was the Commonwealth which first formally declared the legislative sovereignty of England over the colonies, and enforced it in 1649–52.

and an ex-Lord Chancellor should sit to hear an appeal in view of the fact that in virtue of their political position both were concerned with responsibility for policy as regards Malta. But this objection rested on failure to recognize the history of the Council as the protector of the prerogative from encroachment.

The Determination of the Prerogative by English Law.—Of the points which were definitely settled by the Committee, one was accepted by appellant and respondent alike against the ruling of the Malta Court of Appeal. That Court ruled that the exercise of legislative power by the Crown in respect of Malta, even if not in origin legitimate, could be held valid under the principles of Roman law by the fact of customary acceptance. This doctrine was rejected by the Committee, which adopted instead the normal view that in political matters the extent of the royal prerogative falls to be determined by the law of England. The exact extent to which effect can be given to local law existing before the acquisition of British sovereignty was not indicated by the Committee, and was no doubt irrelevant to the case.

Conquest and Cession.—The first contention of the respondent in the case rested on the fact that Malta was not acquired by conquest or cession of the ordinary type from a foreign sovereign, but its possession was based on a voluntary acceptance of British sovereignty, consequent on a war in which the Maltese had acted as co-belligerents with the British forces against France. The appellant, representing the Government of Malta, did not uphold the older view, consecrated for many years in the official Colonial Regulations, that Malta was acquired by Britain through the French capitulation of 1800 to the officer in command of the allied forces, blockading by sea and land, and accepted in effect the doctrine of voluntary cession, as styled by Sir Charles Lucas. On this basis a complete divergence of opinion was expressed. It was contended that the Crown could not claim over co-belligerents the unfettered power of legislation which it was admitted to enjoy over persons in lands conquered or ceded after conquest. In their case its power rested on the barbaric doctrine accepted by Coke that the conqueror had power of life or death and so could deal as he would with his new subjects. In the case of voluntary acceptance of British rule this reasoning could not apply and the King could have no higher powers than over his English subjects, so that he could legislate and tax only with the assent of a representative legislature. It was pointed out that the Maltese had revived and operated successfully during the period of revolt against the French, from 1798 to 1800, an elected assembly, and had demanded its retention when in 1813 the Crown decided to accept the Maltese as British subjects, thus ending the abnormal position of affairs under which the Maltese were under a British protectorate. The Court, however, held that, despite the difference in conditions of acquisition, voluntary cession should be assimilated in its legal effect as regards the legislative prerogative of the Crown to ordinary cession. No judicial authority could be adduced, and the fact that Blackstóne did not discriminate between kinds of cession can hardly be regarded as relevant, seeing that, when he wrote, no case of voluntary cession existed, and he could not be expected to foresee anything so unique as the case of Malta. The only textbook authority in which the point was dealt with, namely, statements by the present writer,[1] was referred to by the Committee as supporting the view taken by their Lordships. It must, however, be noted that the cases of tribal chiefs accepting sovereignty, Basutoland, Fiji, and the Gilbert and Ellice Islands were instances in which the cession was made to the end that the Crown should exercise full power, while the view taken as to Malta was that it was acquired by capitulation from the French. But at any rate the identification of cession and voluntary cession as regards effects is now definitive. If acquisition of complete authority in such a case is not to be excluded, Parliament must intervene.

The Doctrine in Campbell v. Hall.—The respondent had succeeded in the Court of Appeal on the ground that, while the legislative power of the Crown had duly existed by custom, nonetheless it was extinguished for all purposes, save in so far as it was expressly reserved for imperial interests, by the Letters Patent of 1921 which conceded in local issues responsible government to Malta. The Court relied on the famous declaration in *Campbell* v. *Hall*[2] that the creation of a representative legislature without reserving the right to legislate deprived the Crown of any legislative power. Thus by giving Grenada an Assembly and thereafter imposing a duty on exports, the Crown was unable to raise the duty. The Judicial Committee, however, ruled that this proposition was subject to a proviso. If the representative legislature were duly revoked, the power to legislate revived. It is clear, however, that no such idea occurred to Lord Mansfield or to British Governments from 1774 onwards. At the appointment of each new Governor the existing Letters Patent were revoked, and for the time being the legislative institutions were ended. There would therefore have been no difficulty in imposing the tax before recreating the Assembly on the principle now laid down by their Lordships and it would certainly have been acted upon by ministries desperately anxious to secure funds, free from Parliamentary control, for pensions to favourites. We must recognize that this new version of *Campbell* v. *Hall*, found in no textbook, is a revision of that judgment, which, of course, is entirely within the power of the Committee. But a greater difficulty is created by *In re the Lord Bishop of Natal*,[3] a famous case which elicited from the Judicial Committee a declaration that, after the grant of representative institutions, the Crown stood to the local legislature in the same position as it stands to the Parliament in the United Kingdom. As the Committee has not referred in its judgment to this case, it is not possible to say how it distinguished it from that before it;

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[1] Halsbury's *Laws of England*, 2nd ed., vol. XI, p. 11.

[2] (1774) 1 Cowp. 204.

[3] (1865) 3 Moo. P. C. (N.S.) 115, 148, 152.

prima facie it seems to be a clear case of simple overriding as, of course, it is entirely within the discretion of the Committee, though such a discretion is normally not exercised tacitly. It is clear also that the Court of Appeal adduced a very strong ground for its view when it referred to the fact that, whenever the Crown issues Letters Patent and intends to reserve legislative power, it inserts in the Letters Patent two reservations, one of the right to alter or revoke, one of the right to legislate. When, on the other hand, it deals with territories where it has no legislative power, it inserts only the first reservation. Thus for the Dominions and Australian States, Bahamas, Bermuda, Barbados, Newfoundland, British Honduras, and the Leeward Islands, as formerly for the Cape of Good Hope and Natal, the first reservation alone is inserted, and that was the reservation inserted for Malta by the Malta (Letters Patent) Act, 1936. The judgment does not deal with this point, but it takes the view that, in the ordinary form of two reservations, that of legislative power is intended to refer merely to a concurrent power during the existence of the Letters Patent. That, however, can be said certainly to be mistaken. The origin of the reservation goes back to 1831 and the immediately following years when it was a reservation of the right to legislate with the advice and consent of Parliament or the advice of the Privy Council. That form is even yet sometimes found as in the case of Ceylon, and it is quite impossible to suppose that it was a reservation of a concurrent power of Parliamentary legislation. Moreover, it is regularly the practice as in the case of Ceylon in altering Letters Patent to recite as the source of power the reserved right to legislate.[1]

A New Constitution for Malta.—Happily the rejection of the view of the Court of Appeal has been followed by the immediate announcement that Malta will be given in due course a constitution which may perhaps[2] be regarded as just falling within the definition in the Colonial Laws Validity Act, 1865, of a representative legislature. There will be ten elected members as against eight official and two nominated, while the Governor will preside but with a casting vote only. The right to legislate by Order in Council will be reserved, and in addition the Governor will have special powers to secure legislation when necessary. The language question will be wholly reserved from discussion or legislative power, and the Governor may prevent, if he deems it desirable, discussion of defence issues. The constitution thus gives the islanders a share in the control of matters affecting their persons and property, while ensuring to the Crown full power to safeguard all imperial interests. As always, the success of the new scheme will depend on the readiness of those affected to work it, and it has been welcomed by Lord Strickland as a reasonable compromise between the rights of the Maltese to a measure of liberty and the necessitities of the security of the Empire.

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[1] It seems probable that the inclusion of one reservation only in the Act of 1936 was an oversight, for undoubtedly it was the intention to take power to legislate. The Committee mentions that the British Settlements Act, 1887, could not apply as Malta was ceded : in any case it clearly is limited to cases of settlement in uncivilized lands, and to apply it to Malta would have been thus absurd.

[2] If the Governor is reckoned in, the elected members are not half the legislature, but, as he has no ordinary vote, he may perhaps be excluded in reckoning.

Judicial and Administrative Functions.—This question, more often raised in Australia, formed the subject of an important decision in *Toronto Corporation* v. *York Corporation*.[1] The issue there was whether the powers given by the legislature of Ontario to the Ontario Municipal Board could be supported or whether they were not invalidated by reason of the fact that the Board was not duly constituted to exercise judicial functions, seeing that its members were not appointed by the Governor-General, did not hold office during good behaviour, and were not paid by the Parliament of Canada as required in the case of judges of superior, district and county courts by ss. 96, 99 and 100 of the British North America Act, 1867. The Committee had no difficulty in holding that, so far as the Ontario Municipal Board Act, 1932, conferred on the Board judicial powers proper, it was ineffective, because of the faulty constitution of the Board. But, so far as the Act gave administrative powers, it was valid, for the provisions were separable, and, even though they gave powers of inspection, examination and discovery of documents, this was not inconsistent with the position of an administrative body which had to ascertain the facts with which it was required to deal. Such powers had already been held valid in *Proprietary Articles Trade Association* v. *A.-G. for Canada*,[2] and their existence had been held not to convert a Commissioner armed with them into a Court of Justice, in *O'Connor* v. *Waldron*.[3]

Inter-Imperial Enforcement of Judgments.—How far from complete is the acceptance in the Dominions of the system of inter-imperial enforcement of judgments was well shown in *Yukon Consolidated Gold Corporation Ltd.* v. *Clark*,[4] where the issue was the right of the respondents, who had issued a specially endorsed writ based on a judgment for costs secured in Ontario, to take this action. Ontario, it appears, has never taken advantage of the procedure laid down in s. 9 of the Administration of Justice Act, 1920, and under an Order in Council issued under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 7, reciprocity in enforcement of judgments if desired must now be arranged under s. 1 of that Act. The Act by s. 6 introduces the rule that no proceedings for a sum recoverable under a foreign judgment to which the Act applies, other than proceedings by way of registration under the Act, shall be entertained in the United Kingdom, and the right to sue on the Ontario judgment was challenged on that ground. It was held, however, by the Court of Appeal that the Act was only operative in respect of judgments of courts in countries to which the Act had been made applicable by Order in Council on the basis of reciprocity, and that it had no effect in the case of any part of the Empire in respect of which no order had been issued. The decision seems obviously correct; the Act is plainly intended to confer the benefits of a simplified procedure on the basis of reciprocity in respect of enforcement of foreign judgments, but not to take away the ordinary right to sue on such judgments in cases where no arrangements have been for any reason made to bring the Act into operation. It must be remembered that the conditions as to the issue of an Order laid down in the Act are not always such as to be conveniently accepted in the Canadian provinces, a fact which explains the failure to secure the application of the Act of 1920.

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[1] [1938] A.C. 415.

[2] [1931] A.C. 310.

[3] [1935] A.C. 76.

[4] [1938] 2 K.B. 241.

Provincial Powers over Marketing.—An interesting but not unexpected judgment in *Shannon Bros.* v. *Lower Mainland Dairy Products Board* [1] asserts once more the readiness of the Judicial Committee to uphold the validity of provincial authority in matters of marketing of natural produce. The attack on the British Columbia legislation, Revised Statutes, 1936, c. 165 was based on several grounds. (1) It was held that it encroached on the class of subjects given exclusively to the federation by s. 91 (2) of the British North America Act, 1867, the regulation of trade and commerce. But the Committee held that the powers taken fell easily within provincial power, the pith and substance of the Act being to regulate businesses entirely within the province, and so being wholly *intra vires*. That really was an issue so often covered by authority [2] that to argue it again was superfluous. (2) It was further objected that the system of licence fees provided for under the Act to be levied on persons producing, packing, storing, transporting or marketing the regulated products was invalid as encroaching on the sole federal right of imposing taxation other than direct taxation. But the Committee, while not deciding that such licences could be regarded as valid as direct taxation under s. 92 (2) of the Act of 1867, held that, if regulation of trade were valid, the use of licences for that purpose,[3] the normal method of regulation, must be valid ; if licences were granted it seemed proper that fees could be charged either to defray the cost of administering the regulation or to increase the general funds of the province or both. S. 92 (9) of the Act of 1867 gives express power as to shop, saloon, tavern, auctioneer and other licences in order to the raising of a revenue for provincial, local, or municipal purposes, while by sub-s. 13 property and civil rights and by sub-s. 16 matters of a merely local or private nature in the province are exclusively provincial for legislation. Here again the matter appears to have been so fully covered by authority that it was not seriously open to discussion. (3) Their Lordships evidently felt that this was true of the last objection, which denied the power of the legislature to give to the Lieutenant-Governor in Council a large number of powers as to the constitution and working of marketing boards, including power to delegate to such boards powers to fix and collect licence fees. Within its appointed sphere, they pointed out once more, the provincial legislature was as supreme as any other Parliament, a dictum showing the determination of the Committee to maintain intact the doctrine that the sovereign power of legislation in Canada is divided, and that in its own sphere it is as valid in the provinces as in the Dominion. Frankly, it is clear that, if the position of the provinces is to be weakened in any degree, it must be by legislation, not through efforts to induce the Committee to depart from the views it has so long adopted, however divergent they may be from the intentions of the framers of the federal compact.

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[1] 54 T.L.R. 1090.

[2] *Gallagher* v. *Lynn*, [1937] A.C. 863, 869 is made part of the chain of authority on Dominion law. See *Journ. Comp. Leg.*, 3rd Series, vol. xx, pt. i, p. 118.

[3] The views of Duff J. in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, 364, are overruled.

Albertan Social Credit Legislation.—The Judicial Committee is accustomed to restrict its decisions to matters of substance, and this rule was applied with wide results in the appeal, *A.-G. for Alberta* v. *A.-G. for Canada*. The Supreme Court had ruled *ultra vires* the Act to Amend and Consolidate the Credit of Alberta Regulation Act and the Act to Ensure the Publication of Accurate News and Information, and a ruling by the Privy Council in like sense was expected. But it turned out that the repeal in April last of the Alberta Social Credit Act had abolished the instrumentalities through which these Acts could operate, and the Committee thus ruled that they could not hear counsel on either measure. There remained only the Act respecting Taxation of Banks to consider, and that raised the issue whether a measure intended in effect to destroy the operation of ordinary Canadian banks in favour of a provincial state bank to operate the system of social credit was *intra vires*, as legislation to raise direct taxation, or *ultra vires* as in pith and substance not a genuine taxing Act. For the chartered banks of Canada the objection was taken that the province could not properly tax the banks as Dominion corporations on the basis of their capital, or their reserves or their profits earned throughout the Dominion. It is not surprising that the appeal was unsuccessful, when it is noted that the additional taxation imposed by the Act was an annual imposition of ½ per cent. on the paid-up capital and 1 per cent. on the reserve funds and undivided profits. Taxation of such a kind aimed clearly not at raising a revenue but at driving the banks out of business, and raised definitely the essential distinction between the honest, if drastic, use of a power and its application for wholly irrelevant purposes. It is to be noted that the royal assent had not been given to the measures brought before the Courts, the Lieutenant-Governor having on instructions from Ottawa refrained from assenting; but, if the measures had been held valid by the Supreme Court, no doubt the Dominion ministry would have had to face the question whether it could allow assent to be given. The view of the Dominion on this subject is sufficiently shown in its disallowance of the Home Owners Security Act and the Securities Tax Act, passed at the last session of the legislature, in the interest of the maintenance of the sanctity of contractual obligations.

The Immunity of Indian States.—In *Gaekwar Baroda State Railways* v. *Hafiz Habib-ul-Haq*[1] the Judicial Committee has asserted in the most uncompromising fashion the general principle that rulers of Indian States are normally exempt from the jurisdiction of the courts of British India. The immunity of such princes is not absolute under the Civil Procedure Code, 1908, for suits can be instituted with the consent of the Governor-General but only under quite definite conditions set out in s. 86 (2) of the Code. In this case the Indian Courts had allowed suit against the Baroda State Railway on the score that it was a corporation which could be made liable through its manager and owner, the Gaekwar of Baroda, without involving a direct suit against the latter. It was not easy to follow the rulings of the Indian Courts, and the Judicial Committee seems clearly to have followed precedent and principle in its ruling. It is a different question, discussed in *The Cristina*,[1] how far such exemptions from jurisdiction in respect of commercial transactions are desirable or defensible. Their restriction seems eminently to be desired. Fortunately, on one point, some measure of relief to the litigant has been accorded. The Court of Appeal,[2] following the view of Lord Maugham, has adopted the view that a mere claim by a foreign sovereign does not exclude the jurisdiction of British Courts, though no action can be brought against a foreign sovereign,[3] directly or indirectly, to deprive him of property which he has reduced into possession.[4]

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[1] 107 L.J.P. c. 46.

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[1] 107 L.J.P. 1.

[2] *Haile Selassie* v. *Cable and Wireless Ltd.*, 54 T.L.R. 996. For the hearing of the action and decision for the Emperor, see *ibid*, 1087.

[3] *De facto* as well as *de jure*; *The Arantzazu Mendi*, 54 T.L.R. 981.

[4] Cf. Keith, *Juridical Review*, 1938, pp. 179 ff.

NOTES.

Constitutional Government and the Rule of Law.—The doctrine of the Rule of Law was regarded as of great constitutional importance by writers of a generation since. To-day its meaning is said to be obscure and its value questioned. In view of the interest recently aroused on the subject, we make no apology for inserting the following remarks by Mr. Godfrey Phillips:

In a brief note published in this *Journal* in 1934[1] the present writer endeavoured to stress the danger of the modern tendency of writers and teachers of constitutional law to underestimate the importance of the doctrine of the Rule of Law. Mr. John Willis, writing of "the falsity of the concept rule of law," described this endeavour as managing to reduce the Rule of Law to a vague idealistic principle of "certainty, absence of arbitrariness and the possibility of confidence in business dealings."[2] An article by Dr. Jennings in the last number of this *Journal*[3] inspires, however, another endeavour to comment upon the present tendency of constitutional lawyers to underrate a doctrine of cardinal importance.

Dr. Jennings, whose works on constitutional law are of outstanding value, has brilliantly analysed and criticized the various aspects of the Rule of Law as expounded by Dicey.[4] With his analysis and criticism of specific applications of the doctrine few will disagree. To-day the individual is part of a highly complex organization. He is dependent on State activities rather than in need of protection from State interference.[5] It is undoubtedly true that it would be a partial presentation of facts to-day to say with Dicey that "the general principles of the Constitution are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts."[6] The result of parliamentary sovereignty is that the law may at any moment be changed.[7] The English law relating to remedies for wrongs committed by administrative authorities may justly be criticized as defective, owing to the immunities possessed by the Crown ; and Continental systems of administrative courts may in many ways operate more favourably to individual liberty than does the English absence of a regular system of administrative tribunals.[1]

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[1] *Journ. Comp. Leg.*, Third Series, vol. xvi, pt. i, p. 302.

[2] "Three Approaches to Administrative Law." 1 *Toronto Law Journal*, p. 74, Note 73.

[3] "Administrative Law and Administrative Jurisdiction," *Journ. Comp. Leg.*, Third Series, vol. xx, pt. i, p. 99.

[4] See especially *The Law and the Constitution* (second edition).

[5] *Ibid.*, c. 1.

[6] *Ibid.*, p. 38.

[7] *Ibid.*, p. 56.

Accepting, however, the validity of all these criticisms, it is none the less submitted that the theory of the Rule of Law as expounded by Dicey, but brought up to date by the embodiment of these generally accepted criticisms made by modern constitutional lawyers, of whom Dr. Jennings may be regarded as the most influential, is of the utmost value and importance to the constitutional lawyer. Dr. Jennings criticizes what he describes as " the modified Dicey school." [2] It is, of course, right that a student of law should appreciate the true nature of the content of administrative law, but it is still more important that he should realize the fundamentals of constitutional government. It is because a departure from those fundamentals is most easy where legislative and judicial powers are given to public authorities that from the point of view of the constitutional lawyer the legislative and judicial powers of administrative authorities are those which need special emphasis. Dicey taught us that parliamentary sovereignty and the Rule of Law are connected. The law is the law laid down by the elected representatives of the people, and accordingly tends to correspond to the general will of the people and so to be respected by them. Where legislative powers are delegated to administrative bodies without adequate parliamentary control there is an inevitable danger that rules will be promulgated which will not command popular assent. In a world of dictatorships it is of public importance that the teacher of constitutional law should stress those principles of government which make possible the working of a democratic polity. Any disrespect for the law or refusal by any large minority to obey it may force the majority to prefer dictatorship to anarchy. It is not that the supporters of the Rule of Law think that public authorities " ought not to have wide powers," [3] but that they realize that those powers need control so that their exercise may be in accordance with the general will.

A similar argument applies to judicial powers. The ordinary courts have defects, but they have a tradition of impartiality and publicity which commands wide respect. Judicial powers may on occasion properly be conferred upon administrative bodies, but before any such conferring of judicial powers is sanctioned it should be remembered that any widespread exercise of judicial powers by bodies which to the man in the street lack the traditional sanctity of the ordinary judiciary may result in a spirit of criticism of the administration of justice which in turn may lead to a defiance of the law. The constitutional lawyer is not concerned with political theories, but it is through constitutional law that the many students of law are brought most directly into touch with public affairs. In a democratic country stress is rightly laid on the fundamental principle of democratic government, that institutions of government must be such as to ensure that the will of the majority prevails and is accepted.

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[1] See especially *The Law and the Constitution* (second edition), c. 6.

[2] " Administrative Law and Administrative Jurisdiction," *Journ. Comp. Leg.*, Third Series, vol. xx, pt. i, p. 99.

[3] *The Law and the Constitution* (second edition), App. II, p. 288.

Dr. Jennings attempts to present us with a dilemma : " if, then, the Rule of Law means only that powers must be derived from the law, all civilized States possess it. If it means the general principles of democratic government, it is unnecessary to mention it separately." [1] The Rule of Law means certain clear specific principles in regard to the distribution and exercise of public powers which make possible the working of constitutional government. There is truth in Dr. Jennings's own statement that the Rule of Law is in large part synonymous for constitutional government.[2] Constitutional law is the law of constitutional government, and should be so studied and taught.

In dealing with that aspect of the Rule of Law as expounded by Dicey which stresses the absence of arbitrary power Dr. Jennings states that the Rule of Law is apt to be rather an unruly horse. " If it is only a synonym for law and order, it is characteristic of all civilized States ; if it is not, it is apt to express the political views of the theorist and not to be an analysis of the practice of government." [3] The dilemma is a false one. There may be law and order without a Rule of Law ; the Rule of Law is concerned with the analysis of the practice of all constitutional government, not with the political views of theorists. Where there is arbitrary power there can be no certainty. Perhaps the most important aspect of the Rule of Law is insistence upon the precise promulgation of laws. The citizen, if he is to enjoy freedom, must be able to foresee to a reasonable degree the legal consequences of any action that he may take. Here again we are brought into contact with the dangers of too indiscriminate a delegation of legislative and judicial powers to administrative bodies. Can a citizen reasonably feel confident that his actions will not infringe one of the innumerable statutory rules and orders promulgated by Government departments ? Can he feel sure that, if his case is adjudicated upon by an administrative body, it will be adjudicated upon with that same detachment which characterizes the ordinary courts of justice ? Reasons of State may frequently require that individual certainty must give place to public necessity in an age when, as has been agreed, State assistance may be of more importance to the majority of the community than is protection from State interference ; but the doctrine of the Rule of Law none the less provides an all-important series of principles by which departures from normal precedent may be tested. Discretion must frequently be given to administrative authorities, but such discretions must be controlled and directed to ensure that as far as is possible they are exercised in accordance with the Rule of Law. The Rule of Law does not imply merely the existence of public order. It implies an enforcement of public order by methods which are compatible with freedom. The various aspects of the Rule of Law expounded by Dicey (though modified and brought up to date to correspond with present-day conditions) all interlock and illustrate this principle. The ordinary courts command a respect which tends to secure obedience to the law; law promulgated by Parliament is representative of the general will of the people, and so tends to be obeyed. The citizen must reasonably be able to foresee the consequences of his actions and be secure from punishment except in respect of conduct clearly forbidden by law. There are certain fundamental liberties which must be preserved: freedom of speech, freedom of public meeting, freedom of association, freedom of election; police powers must be clearly defined.

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[1] *The Law and the Constitution* (second edition), App. II, p. 291.

[2] *Ibid.*, p. 48.

[3] *Ibid.*, p. 59.

Some Reflections on Lewis v. Cattle.—The widespread interest which has been aroused by the decision given in the King's Bench Division on April 8, 1938, in *Lewis* v. *Cattle* may justify a brief discussion how the problem involved would be treated in some foreign legislations. The case itself is too well known to need more than a summary reference. A journalist publishes—apparently under his name—an article in a daily paper which, in the opinion of the local police, could only have been based on material received from a police officer under violation of the Official Secrets Act, 1911. The police, thereupon, ask him to disclose the name of his informant; the journalist refuses and is convicted under the Official Secrets Act, 1920. This case, although touching the general question of the legal protection of anonymity in the Press, has three distinguishing features: Firstly, it is not the right of the author of the article to retain his anonymity that is brought in question; not he, but his informant, was unknown. Secondly, the contents of the article as such were not objectionable; it was merely the fact of its publication to which exception was taken. And finally, as a violation of the Official Secrets Act was suspected, the journalist came under the scope of this special statute, which enabled the court to avoid the general problem of how far confidential communications received by the Press are privileged. The present note is not concerned with the special question whether the prosecution in *Lewis* v. *Cattle* was in harmony with the intentions of the legislative bodies at the time when the Official Secrets Act was enacted. It would, however, be a mistake to assume that there is any *general* protection in English law for confidential communications made for publication in the Press. Whilst, for instance, in a libel action the proprietor, publisher and editor cannot, as a rule, be forced to disclose the name of the writer of an offending letter,[1] the writer himself is bound to disclose the name of his informant.[2] " I can see no sufficient ground of principle for extending the rule of practice so as to bring the writer of a letter in a newspaper within the umbrella of the newspaper" (Scott L.J., in *South Suburban Co-operative Society Ltd.* v. *Orum and Others*). The reason for this discrimination probably lies in the fact that we are here concerned with a privilege which the Press as a profession has succeeded in obtaining for its own members without any extension of this protection to outsiders. In other words, the privilege owes its existence more to the growing power of the journalistic *profession* than to the idea that *nobody* should be deterred by the fear of consequences from bringing his grievances before the public. Of course, if the writer of the letter remains anonymous, the right to compel him to name his source becomes a dead letter. It is, however, not only the greater and better-organized power of the journalistic profession but also its code of ethics that has resulted in privileged treatment, since the existence of such a code in itself represents a guarantee against the worst abuses of the privilege.[1] The analogous position enjoyed by the legal profession in this direction may have greatly assisted the efforts of the Press by supplying them with a suitable precedent. This analogy between the Law and the Press is, however, far from complete: not because, in the case of Press communications, the injury done by a breach of confidence would be less significant than the benefit gained through secrecy.[2] The real difference lies in the fact that for the legal as well as for the medical profession the secrecy usually refers to the contents of the communication, and not to the person of the informant, whilst the opposite is true of the Press. This has not always been clearly recognized, and thereby the understanding of the issues involved has suffered.

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[1] See Fraser on *Libel and Slander*, 7th ed., 1936, pp. 236–7; Charles Pilley, *Law for Journalists*, 2nd ed., 1932, p. 136.

[2] See *South Suburban Co-operative Society Ltd.* v. *Orum and Others*, [1937] 2 K.B.D. 690; *Adam* v. *Fisher*, (1914) 110 L.T. 537.

Foreign legislations, on the whole, go much farther in sanctioning the right to professional secrecy. In Germany, Italy, France, the medical profession is no less protected than the legal, whilst in England a doctor can plead no privilege.[3] So far as the Press is concerned, it is, however, interesting to note that the English differentiation between the professional journalist and the occasional contributor has also been recognized in most of those foreign legislations which deal with the problem at all. Whilst in the majority of the States in the U.S.A. a right of the Press to withhold the source of news has not been recognized,[4] this is otherwise in New Jersey and Maryland. In the Maryland Code, for instance, it is provided that " No person engaged in, connected with, or employed on a newspaper or journal shall be compelled to disclose in any legal proceedings or trial, or before any Committee of the Legislature or elsewhere, the source of any news or information procured or obtained by him for or published in a newspaper on and in which he is engaged, connected with, or employed." The wording of this Statute might be open to improvement, particularly as it seems not perfectly clear whether occasional contributors are included in the category of persons " connected with " a newspaper. Nevertheless, Dean Wigmore's criticism, which calls the Act " detestable in substance and crude in form,"[1] would seem to go a little too far, and his prognosis that this enactment would probably remain unique has proved wrong because of the attitude adopted not only by New Jersey but also by some Continental legislations. On the Continent, it must be remembered, the weapons used against the Press are, unlike the English custom, much more in the nature of criminal than of civil proceedings. It is, therefore, in the first place the sphere of the criminal law that has to be searched In Germany, for instance, the Press might have lived fairly comfortably under the protection of the law which, for civil proceedings, constitutes a general right not to give information as to questions which a witness could answer only under violation of professional secrecy—although even here the legal position was far from clear. For criminal proceedings, however, which have always been much more frequent in Press matters, it was not till 1926 that the Press at last achieved the passing of a statute granting to the editor, publisher and printer of a periodical the right in a criminal trial—even if it be a question of high treason—to refuse information as to the identity of the author of an article. This right, however, can be claimed only if an editor of the periodical has chosen to be punished for the publication in question, or at least if there exists no legal obstacle to his being punished. Moreover, it is only the anonymity of the author that is protected, and not that of his informant ; and, finally, the privilege does not exist in cases where it is not the contents of the article but merely the breach of an official secret that makes the publication an offence. Under this German Act the legal position in *Lewis* v. *Cattle* would thus be the same as in England. It might be apposite to inquire how far that statute has survived the Nazi Revolution. The *Schriftleitergesetz* of October 4, 1933, s. 20, imposes upon the editor-in-chief of a newspaper the duty to supply anyone who can credibly claim a justified interest in the matter with information as to the person of the particular editor responsible for a certain article, advertisement, etc. That means obviously the abolition of the principle of anonymity only with respect to the editor. The author, as such, falls outside the scope of the *Schriftleitergesetz*, and it has been explicitly recognized in official commentaries that the Statute of 1926 is still in force so far as the author is concerned. Only if one of the editors is himself the author, there is some doubt as to whether the old or the new law should receive preference.[1]

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[1] See, for instance, No. 5 of the Code of Ethics adopted by the American Newspaper Guild, published in E. Seldes, *Freedom of the Press*, p. 370.

[2] This would be the criterion applied by Dean Wigmore; see John Henry Wigmore, *A Treatise on the Anglo-American Law of Evidence*, vol. v (2nd ed.), 1923, s. 2285.

[3] See Phipson, *Evidence*, 7th ed., 1930, p. 197; and the discussion in A. M. Carr Saunders and P. A. Wilson, *The Professions*, 1933, p. 423.

[4] Frederick Seaton Siebert, *The Rights and Privileges of the Press* (New York and London, 1934), p. 98.

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[1] *Op. cit.*, s. 2286 fn. 7.

The Austrian Press Law of 1922, a very modern-minded, in some aspects perhaps even ultra-progressive, piece of legislation, granted the right to refuse evidence, in a more general way than German law, to anyone who co-operates professionally in the production of a periodical, without making this right dependent upon the legal possibility of punishing the editor. But even here the privilege (besides excluding advertisements) was limited to cases where the contents of the article itself, and not only the way of getting them, were contrary to the penal law.

A particularly interesting situation seems to have arisen in Soviet Russia. There the Press has largely to rely upon information supplied by "workman- and peasant-correspondents" who have semi-official functions, and whose "letters to the editor"—especially so far as they contain complaints—have to be treated with the greatest circumspection by the authorities.[2] With regard to such correspondents, the rule of anonymity is to be observed with the utmost rigour on account of the grave risks of personal violence to which the correspondents expose themselves. No wonder, then, that Soviet law has not been content with granting to the professional journalist the right to secrecy. According to a decree of the Supreme Court of the U.S.S.R. of January 31, 1925, any betrayal of the names of such correspondents is brought, by means of analogous application, under the scope of a paragraph of the Penal Code which penalizes the publication of secret facts of judicial preliminary proceedings.[3] In Soviet Russia, even the non-professional contributor is thus brought fully "within the umbrella of the newspaper."

Hermann Mannheim.

Chatham House.—Chatham House in St. James's Square, London, is well known as the former residence of the great Earl whose name it bears and where two other famous English statesmen, Lord Derby and Mr. W. E. Gladstone, also once lived. In recent years Chatham House has come to be known as the home of the Royal Institute of International Affairs, which was fortunate enough to acquire this historic place as its seat. In this little book [4] Commander King-Hall, who was one of the earliest members of the Royal Institute, and who has been from the beginning and still is one of its guiding spirits, has told the story of why and how it came to be founded, what it has attempted to do and what it hopes to do in the future. The story is an interesting one of a unique institution whose history goes back less than twenty years. It grew out of the need felt by a small group of Englishmen at the close of the World War for an organization to collect and make available information about international relations and to promote scientific study and investigation in this field. From a very modest organization, with a staff of two or three persons, almost no resources and only two rented rooms in which to carry on its work, it has grown rapidly to be an institution with some 2,500 members, with an annual budget of more than £30,000, a salaried staff of about seventy-five men and women, an already large and rapidly growing library and a commodious and permanent home of its own.

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[1] The question is fully discussed in Dr. Walter Stark, *Die Verantwortlichkeit des Schriftleiters*, Berlin, 1935, p. 40.

[2] See Hans von Eckardt, *Russia*, 1932 (New York, Alfred A. Knopf Inc.), pp. 583 *et seq.*; Theodor Seibert, *Red Russia*, 1932, pp. 251 *et seq.*; Arthur W. Just, *Die Presse der Sowjetunion* (Berlin, 1931), ch. v.

[3] See Boris Mirkine-Guetzévitch, *Das sowjetrussiche Pressrecht* (Berlin, 1931), p. 44.

[4] *Chatham House.* A Brief Account of the Origins, Purposes and Methods of the Royal Institute of International Affairs. By Stephen King-Hall. (London: Sir Humphrey Milford. Oxford University Press, 1937.) Pp. xii + 144. 5*s*.

The instrumentalities and methods through which the Institute carries on its activities are : meetings of various types held at Chatham House, at which lectures are delivered on current questions of international relations by scholars and specialists ; the conduct of investigation and research on a great variety of subjects, usually of current interest, carried on by scholars who receive financial aid from the Institute and whose work is conducted under its direction and supervision ; the collection of material for the use of research workers ; the holding of conferences of various types at Chatham House and elsewhere for study and discussion, and the publication of books, periodicals and reports. The latter activity is one of the most important of the Institute, for it has become a publisher on a considerable scale of literature in the field of international relations, the number of publications on its list already being more than one hundred. These include such well-known works as Temperley's *History of the Peace Conference of Paris* in 6 volumes, Toynbee's *Annual Survey of International Affairs* and its companion volume of *Documents on International Affairs*, *The British Year Book of International Law* and two periodicals : *International Affairs*, published bi-monthly, and the *Bulletin of International News*, published fortnightly. Few important libraries anywhere in the world are without these publications, for they are indispensable to students of international law and international relations. Besides these more general publications the Institute has published a large number of books, monographs and reports dealing with questions of a more special character. Altogether its publications make a very creditable library in themselves. In addition to these the Institute has built up by purchase or gift a library of more than 43,000 books and pamphlets, to say nothing of a vast collection of newspapers, periodicals, press cuttings and maps. Among its most valuable collections is a complete set of the publications of the League of Nations.

On the whole, it can be said that the Royal Institute of International Affairs is to-day quite the most important organization of the kind in the world. It is one of the first institutions to which students and research workers in the field of international affairs turn for information and guidance. It is at the same time a clearing-house, a director of research, a forum for discussion and exchange of expert opinion, and, as already stated, a publisher on a large scale of scientific literature on international affairs. And it has achieved this unique position within the short period of under twenty years. It furnishes a model and an example which other countries might very well follow, and it deserves the generous support of all persons interested in the advancement of the scientific study of international affairs and the promotion of a better understanding of international problems to which such study will, it is believed, contribute much.

JAMES W. GARNER.

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The Law Reports of Palestine, 1934–5.[1]—The first volume of these Reports was noted in this *Journal*[2] in 1936. It contained judgments from the date of the establishment of the present system of courts in 1920, down to 1933. The new volume covers two years only. The increasing penetration of English law into Palestine diminishes somewhat the interest of Palestine judgments from the point of view of the comparative lawyer. The recent introduction of an English Bankruptcy Law and a Penal Code based on English conceptions, coupled with the promulgation this year of a new body of rules of Civil Procedure, have now left little of the pre-war Ottoman legislation still in force. Happily the Ottoman land legislation has not been radically altered—in that department, at least, we may hope that English ideas will not be allowed entry. And the Mejelle, though much of it is superseded by legislation on European lines, is still in force and is occasionally applied, though not infrequently with expressions of regret. Thus, "While we feel great reluctance in holding that a person who has procured another to damage the property of a third is under no liability to indemnify the person injured, the terms of Articles 89 and 922 of the Mejelle leave no doubt that such was the rule of Ottoman law: and this rule is unaffected by any legislation enacted since the British Occupation."[3]

There remain, of course, the intricate problems which are due to the medley of laws and jurisdictions to which matters relating to the family and to inheritance are still subject in accordance with the principles laid down by the Order in Council of 1922. These, however, give rise to less litigation in the secular courts than might be expected. In the present volume we remark but few cases which concern such matters. That likely to excite most interest is *Volkenberg* v. *Volkenberg*, in which the issue turned upon the validity of a divorce pronounced by a Jewish husband of Czechoslovak nationality against his wife. The Rabbinical Courts possess no jurisdiction in divorce as regards foreign subjects, but under Jewish law divorce is "an act of mutual consent contracted between husband and wife and supervised by Rabbinical authorities only so far as necessary to secure that all requirements of Jewish law in this respect have been fully observed."[1]

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[1] Selected and edited by Sir Michael McDonnell, M.A., Chief Justice of Palestine. (Crown Agents for the Colonies.) Pp. 505. £P.1 750 mils and £P.1 500 mils.

[2] Vol. xviii, pt. i, pp. 138–40.

[3] Per *Curiam* in *Orthodox Patriarchate* v. *Tourpashwili*. Pal.L.R. 1934–5, p. 451.

The validity of the divorce depended, therefore, not upon the limits of jurisdiction of any court, but upon the provisions of the national law, as is provided by Art. 64 of the 1922 Order in Council. Failing evidence that a Jewish divorce by bill of divorcement would be recognized as valid for Czechoslovaks by the courts of Czechoslovakia, the Palestine courts declined to treat it as effective.

The decision, though we must presume it correct as an interpretation of the nature of Jewish divorce proceedings, is somewhat disturbing. The draftsman of the Order in Council certainly aimed not only at denying divorce jurisdiction to the State (Secular) Courts, but also at forbidding foreigners to seek divorce through the courts of the religious body to which they chanced to belong. In the case of foreigners the religious distinction, Christian–Jew was to fade away (as it has long traditionally faded in the Orient) in the light of the, for them, dominant distinction of nationality. But it seems now that a foreigner may find that his religious affiliation may, in Palestine, determine the law by which he is governed in matters of divorce.

It remains only to add that the " get-up " and binding of the volume under review are excellent. But it may be relevant to ask whether so expensive a form is really necessary or desirable. Regular issues of the Palestine Reports are now announced in the *Official Gazette* for June 1938, and are to be published monthly. The annual subscription is £P.3 for the eleven monthly numbers, apparently unbound. The price is very high, and in ordinary circumstances difficult to justify. Possibly the Government considers that the small body of English-speaking advocates must expect to pay heavily for a publication which serves their convenience alone. The Reports, unlike the Ordinances, are published in English only—a language current only in official and tourist circles.

F. M. G.

Legal Deposit of Books.—France was the first country to require by law that a copy of every newly published book should be deposited in a central repository. By the Montpellier Ordinance of December 28, 1537, the Royal Library at Blois, afterwards transferred to Paris, was selected for the purpose, and any publisher failing to comply with the Ordinance might have the whole edition confiscated or be heavily fined. It was not until 1662 that legislation on the subject, primarily directed to secure censorship of the Press, was passed in England, although there had been an agreement, not very adequately enforced, between the Universities of Oxford and Cambridge and the Stationers' Company which was intended to secure copies for them of all printed books. Later legislation beginning with the Act of 1709 was involved in the complications of the copyright laws. Mr. R. C. Barrington Partridge, the Deputy Borough Librarian of Shoreditch, has traced the history of the subject with much thoroughness, commended by Sir Frederic Kenyon, in a thesis entitled *The History of the Legal Deposit of Books throughout the British Empire* [1] which has been approved for the Honours Diploma of the Library Association. In the words of Sir Frederick Kenyon, Mr. Partridge " has rendered a great service " by bringing together in a convenient volume " a mass of information hitherto widely scattered and difficult of access." The book is not only of interest on account of its subject, which naturally appeals to everyone concerned in any way with books, but also as an example of the study of comparative legislation applied to a subject of practical interest. Mr. Partridge, in addition to tracing the history and development of the legislation in a manner which is the really profitable way of studying a subject, has quoted the texts of all the relevant laws. Moreover, although his volume is concerned with the British Empire, he notes in an introduction some of the main points of the legislation of foreign countries. In the United States only the Library of Congress is entitled to free copies of every copyright book, and the power of selection in cataloguing is judiciously exercised. In passing, it may be recorded that the first copy of the Catalogue of the Library of Congress to be made available in England has recently been placed in the National Central Library for students. Amongst Continental countries France has all books published in the Bibliothèque Nationale in Paris, while Italy divides them between the National Libraries of Rome and Florence. In Germany copyright laws are enacted by each of the States. In Scandinavia the printer, not the publisher, is made responsible for the delivery of the copies of books in the Royal Libraries. China, Japan and Palestine seem to be the only countries in which the system is still used for Press censorship. The number of copies varies in different countries. Several countries require only one, Great Britain demands six, Poland seven, Lithuania and Esthonia eight, the Irish Free State ten, Portugal thirteen, Rumania fifteen ; while the Soviet Republic of Ukraine wants fifty or more copies, which, as has been remarked, is " no longer a deposit, but a partial confiscation."

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[1] Per *Curiam* at p. 366.

In the comprehensive section of the book dealing with the laws of the British Empire, India occupies an exceptional position. The Indian Empire is still without a central depository copyright library, though proposals have been considered for giving that position to the Imperial Library at Calcutta. Up to the present day the British Museum has been gratuitously supplied with Indian publications, and since 1867 the local governments of individual Provinces and districts have by law several copies of all books published locally. In the Dominions, as a general rule, the Library of the Legislature is the central library, and there is no longer any obligation to send books to England. Some of the Colonies require books to be deposited in the British Museum, though many have no provision at all for their legal deposit and little has been done to establish local repositories. The one important provision binding upon all colonies by regulations of the Colonial Office is that copies of all Acts must be supplied to fourteen libraries, including the National Library of Scotland and the Signet Library, Edinburgh. As Mr. Partridge is concerned only with the legislative enactments on the subject, he does not record that nearly all the Dominions gratuitously send their laws to the same Libraries. When Lord Macmillan's Committee on Advanced Legal Studies succeeds in establishing an Institute of Legal Research, so that students from all parts of the Empire can be assured of finding the material for the study of the laws of all its constituent parts, no doubt there would be a readiness to add the law reports and even text-books to a recognized repository such as the admirable law library of the Royal Empire Society. The time has gone by for any such action to be based upon legislative enactment. Nevertheless Mr. Partridge is to be congratulated upon the choice of subject which has remained without comprehensive treatment and the thoroughness with which he has accomplished his task.

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[1] Pp. xvii + 364. 18*s*.

C. E. A. B.

Search at Sea.—In his able review of the Columbia University volumes on Neutrality, Dr. Colombos remarks that Professor Jessop "does not sufficiently take into account the fact that cargoes on ships are now so considerable and numerous that it is practically impossible to carry out a detailed search on the high seas." On this, Dr. T. Baty observes that it is a great mistake to suppose that any such searches at sea were ever made. Captors were most strictly forbidden to "break bulk," and it could only be effected in port, by an order of the court. What, then, was the meaning of the word "search"? Search for papers—the primary evidence on which a libel could proceed. The evidence of the ship's company was in principle the only other admissible evidence, unless the claimants were indulged with "further proof." The value of the evidence of the ship's own people has sometimes been impugned. Mr. R. Pares has recently shown that seamen violently object to being deceived by simulated destinations and false representations, which imperil their safety and their wages. He quotes many cases in which such deceptions were the occasion of mutiny and desertion. In one case, indeed, the crew managed to take the vessel to her nominal, instead of to her real intended, destination! So Lord Stowell was fully justified when he said that among a whole crew there might well be some who were prepared to tell the truth. A prize cause is not like a collision case, with its "loyal lies."

Professor Szladits and the Law of Obligations.—The *Bulletin* of the French Society of Comparative Legislation reproduced in a recent issue a lecture given at Paris by Professor Szladits of Budapest, in which an attempt was made to ascertain the modern tendencies in the law of obligations. In his opinion the political changes in post-war Europe and in particular the rise of dictatorships have not so far affected private law to any degree commensurate with their historical significance. Professor Szladits observes that no important change has yet been made in the general private law of Fascist Italy that might not have been sponsored in any democratic State: the Franco-Italian draft of a Code of Obligations (1927), which he cites, is in itself proof that divergent political ideologies need not necessarily imply important differences in the respective notions of civil law. The position may be different in Germany, where a "*los vom römischen Recht*" movement is afoot, but Professor Szladits considers that the reforms in the realm of obligations advocated by German lawyers of standing had for the most part been already adumbrated before the advent of National-Socialism. Political transformations have naturally had their repercussions on private law in those fields where public law impinges on private law, *e.g.* in the rules governing the relations of capital and labour, but the changes thus wrought may appear more important than they are in reality. Economic conditions, on the other hand, have led to widespread interference by the State with the freedom of contract. This, however, is regarded by Professor Szladits as a temporary phase: "il faut se garder de changer *le droit de la crise* en une *crise du droit*," although law may, and probably will, benefit by some of the theories developed in times of stress. Professor Szladits is more concerned with the tendencies which have slowly and quietly gathered strength in the last fifty years. He proves by reference to recent compilations, *e.g.* the Franco-Italian draft of a Code of Obligations (1927), the draft Hungarian Code (1928), the Polish Code of Obligations (1933), that the fundamental notions of good faith and equity have been greatly developed and expanded. It would be unfair to attempt a summary of this penetrating analysis in a short review. Some of the conclusions may, however, be noted. The appellation which Heinrich Heine gave to the Pandects—" the Bible of Selfishness " —cannot be applied to the modern law of obligations which, to use Duguit's expression, has become more and more " socialized." The tendency is to discard formalism and abstract notions in order to achieve more practical results : in other words, a "*Begriffejurisprudenz*" is making way for an "*Interessenjurisprudenz*." Law has become dynamic : it may have thus lost some of its certainty, but as an offset it has acquired the means of ensuring greater concrete justice.

M. F. P. H.

Sham Marriages.—In the same Bulletin Professor Richard of Geneva draws attention to the crying and growing evil of marriages contracted, not with the object of becoming really husband and wife, but for some particular extraneous purpose, *e.g.* avoiding expulsion from a country or acquiring a title or well-known name. For instance, it frequently happens that an alien woman, threatened with expulsion from a country where she desires to continue to reside, marries a citizen of that country. In Switzerland she thereby acquires her husband's nationality, and as a

Swiss citizen ceases to be liable to expulsion. She never intended to live with the husband who married her for a consideration, and she generally divorces him as soon as possible, but she retains the nationality she has acquired through marriage. This evil is not unknown in England, and appears to be widespread, since in the Bill relating to the acquisition and loss of Czechoslovakian nationality provision is made against it. Similarly, the German law of November 23, 1933, provides that any marriage contracted with the sole or main object of enabling the wife to take her husband's name shall be void. Professor Richard examines whether the existing Swiss legislation affords any remedy: an amendment of the law will probably be necessary if all loopholes are to be closed.

M. F. P. H.

Annales de l'Institut de Droit Comparé de l'Université de Paris.—Vol. I of the *Annales* was noted in the issue of this *Journal* for February 1935, and Vol. II in that for February 1937. The present volume [1] opens with a study by Sir Maurice Amos of the Statute of Westminster, 1931, in which he traces the constitutional development of the Dominions up to the passing of that Statute. Professor Del Vecchio has a stimulating article on Individual, State, and Corporation. Professor Vaucher in his study of the Labour Party and the Constitution doubts whether the belief of that party in a revolutionary change by legal and constitutional methods is possible of achievement. Professor Mirkine-Guetzévitch discusses emergency powers under the parliamentary system and succeeds in showing to his own satisfaction that they are reconcilable with democracy. M. Dehousse contributes a most learned and well-documented study on "*La Conclusion des traités d'après la pratique constitutionnel et diplomatique belge.*" His theoretical conclusions may be open to dispute, but he has collected material here for which every student of the subject must be grateful to him.

The section on private law is also interesting. Professor Szladits writes on "*Le nouveau projet de code civil en Hongrie,*" and indicates its debt to German and Swiss influences. Likewise Professor Majeaud in his article on "*Le nouveau code polonais des obligations,*" which came into force on July 1, 1934, shows how this code is also indebted to the same influences and to Austrian sources as well. Among its more interesting features are its acceptance of the theory of "*imprévision*" in the law of contract, and the general acceptance by the Code of the ameliorating principles of equity. These features, and particularly the latter, are severely criticized by Professor Majeaud. An original study by M. Ancel on "*Les cours suprèmes et le 'recours en cassation'*" concludes that the comparative study of the subject leads inevitably to the comparative study of the sources of positive law. There is much deep thought in this short essay.

J. M. J.

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[1] Vol. iii (1938), pp. 315.

American Journal of International Law.—In the January issue Mr. Manley Hudson gives his annual account of the work of the Permanent Court, which only rendered two final judgments in the year 1937. Professor Eagleton writes upon "The Form and Function of the Declaration of War," emphasizing the unsatisfactory state of the existing law, which apparently permits States to engage in hostilities upon a large scale without incurring the legal responsibilities of a belligerent. Professor G. G. Wilson contributes a short note upon the same problem. Dr. Hans Spiegel examines the early history of the doctrine of "denial of justice," pointing out its close connexion with the question of reprisals. Particular mention should be made of an article upon "The *Caroline* and McLeod Cases," by Mr. R. Y. Jennings, the first publication of a young writer from whom much may be expected.

Among the shorter contributions special interest attaches to a note in which Professor Garner surveys the recent discussions upon the question of belligerent rights in the Spanish civil war. Professor Myers discusses the efforts of the League to solve the problem presented when Paraguay left Geneva without paying her bill.

H. A. S.

Zeitschrift für die gesamte Strafrechtswissenschaft.[1]—This famous Journal, founded by Franz von Liszt, still holds the first place in German science of Criminal Law and tries to live up to its former reputation. Of the contents of the first three issues of the current volume the following articles may be mentioned:

Engisch deals fully with the legal aspects of surgical operations, in particular with the significance of the patient's consent; he excludes, however, abortion from the scope of his investigation. It is not without interest to find that even National-Socialism cannot entirely neglect the will of the patient.

Henkel concludes an article on the procedure to be followed in cases of preventive detention according to the Prevention of Crime Act of 1933.

The interrogation of the prisoner is the subject of an article by Engelhard, who rightly disapproves of a suggestion, recently made in Germany, to impose upon the prisoner the duty of answering questions. There is also a summary (in French) of the development of French Criminal Law by Marc Ancel, and Professor J. Goebel's *Felony and Misdemeanor* is fully reviewed by Krawinkel.

A special feature of the Journal are the reports on the progress of Criminal Law in foreign countries.

H. M.

Revista de Derecho y Siencias Politicas.—Dr. Victor M. Maúrtua is the subject of the whole of No. 1 of the second volume of the Revista de Derecho y Siencias Politicas, the organ of the University of San Marcos, Lima, containing 267 pages.

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[1] Vol. 58, Nos. 1–3. (Berlin: Walter de Gruyter & Co.) 1938.

Dr. Maúrtua was perhaps the most brilliant of the internationalists, both in politics and science, that Peru has as yet produced, and was acknowledged as a great authority in the Old World as well as in the New.

Born in the city of Ica in 1865, he died on board the *Northern Prince* on May 27, 1937, while on his way to Brazil to resume his appointment as Ambassador of his country. It would be tedious to recount his numerous and arduous activities, but it may be that he will be best remembered in South America as the representative of Peru in settling frontiers of the adjacent former provinces of colonial Spain, which had never been marked out.

It is said in the quoted volume at page 45 : " In his great and brilliant career he acted in the most important international matters and disputes to which Peru was party, and his name will indissolubly remain bound to the Peruvian diplomatic history of the first third of this century.

" Maúrtua was not an internationalist in the strict academic sense of the word. He was not a creator or promoter of theoretic systems of International Law. He was rather a diplomat in action, whose labour unfolds in direct and immediate relation with actual affairs. This labour of his includes doctrinal bases. But in Maúrtua theory and doctrine is something to be sought to found a solution or practical point of view—not pure abstract science to be applied to actuality. The positive pragmatic aspect predominates over academic speculation."

WYNDHAM A. BEWES.

Annual Register.—The issue for 1937 [1] follows the usual lines. The year, it is observed, was, on the whole, uneventful in the legal world. The section containing Public Documents includes the full text of the Constitution of Ireland, the U.S. Neutrality Act and the non-aggression treaty between the Soviet Republics and China.

C. E. A. B.

[1] London : Longmans, Green & Co. 30*s*.

NOTICES OF BOOKS.

NATIONAL SOCIALISM.

THIS is the first volume[1] of two preliminary or introductory volumes on the general theory of National Socialism, which are to be followed, in their turn, by a number of additional volumes of a more concrete and specific character dealing with different branches of law and of the regulation of social life, in all its forms, in the new Germany of National Socialism. The whole undertaking, which will be a matter of long breath and of many years, is under the auspices of the Lyons Institute of Comparative Law. It is that Institute which has collected, during the last five years, the material on which the present volume is based and on which subsequent volumes will be founded. It is the Secretary-General of the Institute (who is also the Secretary of the Lyons Institute of Social Sciences and International Relations) who has written this first volume ; and he has written it with the collaboration and under the general supervision of members of the Institute—the Director (M. Edouard Lambert), the Dean (M. Pierre Garraud) and a number of their colleagues. The work of Dr. Mankiewicz has thus a double sanction—the sanction of his own scholarship, and the sanction of the general and corporate learning (and the general and corporate method) of the Institute.

Dr. Mankiewicz is himself of German origin : he was educated in German universities, and he served in the German judicature. Expatriated at the age of twenty-seven by the triumph of National Socialism, he joined the staff of the Lyons Institute of Comparative Law (after some preliminary service in the economic and statistical section of the Institute of Social Sciences) ; and it is in that connexion, and on that basis, that he has now published his first work—or rather the first of the two volumes which will eventually constitute that work. The aim of his work is to state the general doctrine—the " ideology " or *Weltanschauung*—of German National Socialism. In the first volume, which is now before us, he deals with this general doctrine on its critical side and in its relations to the other doctrines (Liberal and Marxist) which it seeks to supplant. In the second volume, which is to follow, he proposes to deal with the doctrine of National Socialism on its constructive side, and to elucidate the new concepts and values which it seeks to enthrone.

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[1] *Le Nationalsocialisme Allemand : Ses Doctrines et leurs réalisations.* Tome I. La conception nationalsocialiste du sens de la vie et du monde (*Weltanschauung*) : son rôle—ce qu'elle travaille à détruire. Par H. Mankiewicz. (Paris : Librairie générale de Droit et de Jurisprudence, 1937.) Pp. xxiv + 248, Frs. 45.

Before we attempt to appreciate the achievement of Dr. Mankiewicz, it is just to pay a tribute to the efforts and achievements of the Lyons Institute of Comparative Law. The Institute has already published a series of studies on the law and the institutions of Soviet Russia from the year 1925 onwards. It is now preparing, in conjunction with its sister Institute of Social Sciences, the first volume of an *Annuaire de la Vie Sociale en France*. It is helping the development of Institutes similar to itself, not only in South-Eastern Europe, but also in Egypt and Turkey. To crown its achievement, it has now embarked on this comprehensive study of National Socialism. It has done so in a scientific spirit of clear and cool objectivity. It has collected from Germany (with the aid of German organizations, which has always been readily given) all the public and official material which it could gather. It has sent Dr. Mankiewicz to Geneva in order to study, in the libraries of the League of Nations and the International Labour Office, such further material—articles, pamphlets, periodical publications and the like—as was not already at his disposal in the library of the Institute. It is planning to increase its own collection by adding to the public and official material which it already possesses a fuller supply of the literature published by private scholars in the domain of German law and German social economy. In a word, it has done, and is doing, everything in its power to secure a full and complete documentation in regard to the doctrines, and the realization of the doctrines, of German National Socialism.

How has Dr. Mankiewicz handled his material ? His first volume falls into four main parts. The first part is concerned partly with an attempt to define that elusive general term or conception of *Weltanschauung* which has been current in Germany since the emergence of Marxism about 1850, and partly with a study of the main aspects of the specific and particular *Weltanschauung* proclaimed by the National Socialists. The next three parts are all concerned with the criticisms levelled by the National Socialists against other ideologies or doctrines. The second part (which is also the largest) deals with the National Socialist criticism of the principles and the political theory which sprang from the French Revolution—the principles of individualism and the fundamental rights of man, and the political theory of liberalism issuing in parliamentary democracy. This second part begins with a good, if brief, account of the anti-liberal past of Germany : it ends with a chapter on the history of the Weimar Constitution, which shows the difficulties, finally fatal to its existence, under which liberalism laboured in Germany from the beginning of the Republic, and especially from 1930 onwards.

The third part of Dr. Mankiewicz's volume contains an account of the National Socialist criticism of the actual situation of the liberal State. In the first and main chapter of this part he deals with what the Germans call the liberal " politicalization of economics " and the corresponding (and in their eyes equally fatal) " economization of politics." In other words, he is concerned with the National Socialist indictment that in the liberal

State economic forces master politics, and conversely politics (abnegating its high mission of the defence and promotion of the national interest) is forced to confine its attention to economic issues. In the second chapter of this part the author seeks, once more, to illustrate the particular point and pith of general criticisms by an especial reference to the difficulties of the German Republic, in its dealing with economic problems.

The fourth and last part of the volume is concerned with the National Socialist criticism of bourgeois society. Here Dr. Mankiewicz handles the problem of the relation of State and Society ; he wrestles with the concepts of " Class " and " Estate " ; he deals with the National Socialist attack on Marxism as the logical fruit and the final product of liberalism ; and he ends by giving a picture of the mentality of bourgeois society as it is seen by the National Socialist, and especially as it appears in the pages of Sombart's *Deutscher Sozialismus.* Three appendices complete the volume. The longest, and the most important, is the second, which contains an account of Carl Schmitt's pamphlet on " the Conception of the Political," and of the criticisms (or the support) which Schmitt's theory has received from other German scholars, and especially from Koellreuter.

This is the substance and content of Dr. Mankiewicz's volume. We may now turn to the method which he has used and the success he has achieved by its use. His method is that of letting the pronouncements and the writings of German National Socialism speak for themselves. His text is largely a cento of quotations (it is all the more valuable for that reason) or of pithy paraphrases, presented without comment or criticism, but presented on a definite scheme and in a clearly planned order. The quotations and paraphrases come from the writers, or the documents, generally held by public repute in Germany to furnish the most authoritative expression of National Socialist doctrine. They form a mosaic with a clear and definite pattern which will be intelligible, and may well prove attractive, to the general reader. For the scholar there is a large and well-arranged apparatus of footnotes, which not only give exact references to the matter quoted in the text, but also add good biographical details (for instance on Walter Rathenau) and even succinct little essays on themes relevant to the argument.

Following this method Dr. Mankiewicz has cast a wide net. He is familiar with the writings and speeches of Hitler, Rosenberg, Goebbels, Ley and the other leaders of National Socialism ; he is no less familiar with the writings of Ernst Troeltsch, Müller van den Bruck, Carl Schmitt, Huber, Koellreuter, Sombart, Larenz and other representatives of German thought and speculation. If he is especially versed in legal theory and in legal writings, he has also a good acquaintance with writers on philosophy and sociology, and he has also some acquaintance with the religious problems and issues which have been raised by the National Socialist doctrine. (Those problems and issues, however, are only treated incidentally in one of the chapters of his first part ; and it is to be hoped that when he comes to write his second volume they will engage his attention further and in fuller detail.) If there are any criticisms to be made of his method, they are perhaps mainly two. In the first place, the method of the cent. is sometimes confusing to the reader. When different authors are pieced together in a single paragraph, the edges of their arguments do not always fit. Carl Schmitt and Huber, for instance, may be largely in agreement; but a paragraph which combines quotations from them both may none the less show some angularities. In the second place, Dr. Mankiewicz hardly brings out the distinction, or the relation, between liberalism and democracy, or between National Socialist criticism of the one and its criticism of the other. Nor is it clear what is the relation between his second part, which deals with the German criticisms of the principles and the theory which have sprung from the Revolution of 1789, and his third part, which is concerned (according to its title) with German criticisms of the actual system and situation of the liberal form of State. In effect, the third part is mainly concerned with the relations between politics and economics in the liberal-democratic State, while the second is concerned with the specifically political ideas and institutions by which it is characterized; but this relation might have been stated more clearly.

On the whole, the most successful parts of the book are the beginning and the end—the beginning, which gives a clear statement (so far as the nature of the theme permits clarity) of the National Socialist *Weltanschauung*; and the end, which contains a subtle and sympathic account of the National Socialist view of "bourgeois society." (It may be doubted, however, whether Sombart's frontal and heavy attack on "Western" civilization really deserves the prominence which it is given.) Another feature of the book which deserves praise—so far as a layman in law is competent to praise—is the author's account of the legal theory and the legal developments which have proceeded from National Socialism. He has not only taken account of legal writings: he has also mastered and used legal judgments; and his account, in one of his notes, of the use made by the courts of the idea of *Treu und Glaube mit Rücksicht auf die Verkehrssitte* is particularly striking. Very suggestive, too, is the general account which he gives of the modern German idea of *Werdendes Recht*—of a law, that is to say, which is "organic," and even "biological," and therefore "dynamic" and evolutionary, in the sense that it rejects the bonds of fixed "norms" and seeks to sway and move in obedience to a swaying and moving *Weltanschauung*. This is one of the most remarkable developments of National Socialism; and M. Edouard Lambert, in his foreword to the volume, justly draws attention to the effects of this development on the conception and practice of law in contemporary Germany. Not only does the dependence of law on a general and moving *Weltanschauung* make law uncertain, or at any rate fluid: it also makes law total, or "totalitarian," because the philosophy of life by which it is inspired, and moved, and changed, is total as well as changing. Law accordingly extends its scope, as M. Lambert remarks, to a number of forms of social, or family, or cultural life, which had hitherto escaped its direction. It grows not only in the sense of changing, but also in the sense of extending its dimensions and its area.

It is not only the lawyer, but also the student of philosophy (and particularly the student of political philosophy) who will derive information from the study. Did Hegel, for example, die when National Socialism came into power, on January 30, 1933, or is he still alive and still an influence on the new thought of Germany ? It is a moot question in Germany to-day—just as the death or survival of Goethe may also be a matter of doubt. But it is a question on which Dr. Mankiewicz can write an illuminating paragraph (p. 193, n. 6), which weighs impartially the conflicting evidence. On the whole, it may be said that he moves with safe and cautious steps over the obscure ground of " central *idées-forces*, of psychological *motif* and of social mysticism " which he has sought to traverse. It is a difficult journey,

> Quale per incertam lunam, sub luce maligna,
> Est iter in silvis.

But he has managed to make the journey and to achieve the paradox of describing objectively (so far as it can be done) a doctrine which itself decries and rejects any idea of objectivity.

Some words may be said in conclusion about the plans of the Lyons Institute for the construction and development of the work which has been begun in this preliminary volume. Not only will this first volume, which deals with the critical and negative aspect of National Socialism, be succeeded by a second (also from the pen of Dr. Mankiewicz) which will deal with its constructive and positive side. That second volume will also contain a full and general bibliography of all the ground covered in both volumes ; and in the subsequent volumes, dealing with different fields (law, economics, sociology and the other fields to be covered), special bibliographies will also be added. Nor is this all. Each volume of the whole undertaking is to be divided into numbered sections (there are over 200 sections, for instance, in the volume now reviewed) ; and a system of revision and addition has been planned by which supplements can be issued from time to time, based on a method of reference to the numbered sections, for the purpose of bringing up to date both the contents of each volume and the bibliographical information. This is a scientific procedure, which will have the merit of providing, as M. Lambert says, a " permanent exhibition," constantly renewed, of the doctrines and achievements of German National Socialism. Indeed, the cool and calm spirit of science presides over the whole of the plan of the Lyons Institute. Everything is set down, but nothing is set down in malice or with criticism, however contrary the things set down may be either to French thought or to the international genius of the Institute. Above all, " that last infirmity " of good French minds has been strenuously and objectively avoided—the infirmity which tempts the French thinker to give clarity, logic and precision to whatsoever he touches. It has been, and it will continue to be, the aim of the whole inquiry not to be logical when the views and doctrines treated are themselves beyond the domain of logic. No iron standard has been, or is to be, applied: the aim throughout is to be the aim of using "the leaden standard of Lesbian architecture," as Aristotle puts it, which bends with the anfractuosities and unevennesses of the material. ERNEST BARKER.

CONSTITUTIONAL PROBLEMS OF THE COMMONWEALTH.

IT is impossible not to regret that considerations, doubtless of cost of production, have forbidden Professor Kennedy to revise the first twenty-five chapters of his study of the Canadian constitution which appeared in 1922.[1] It is true that in essentials the picture which he then drew stands unchallenged, but much interesting work has been done in Canada, especially since the foundation of the *Canadian Historical Review*, and it would have been very valuable to know Professor Kennedy's considered judgment on the questions which have been discussed. As it is, we are grateful to the author for accompanying this reissue with chapters on tendencies of Canadian administration, aspects of constitutional law and custom, Canada and the Statute of Westminster and Canada in the British Commonwealth of Nations. To bring the book up to date appendices have been added on the attitude of the Privy Council to the "New Deal," and on the abdication of King Edward VIII and the coronation of His present Majesty. Many interesting points are raised and effectively discussed; among the more novel are the suggestion for the mode of constitutional change in Canada (pp. 528 ff.), which involves the abolition of appeals to the Judicial Committee of the Privy Council, and the proposal (p. 537) that the interpretation of the Statute of Westminster should be given to a permanent Commonwealth Court on the lines, *ceteris paribus*, of the Permanent Court at The Hague. Though neither project is likely soon to receive general accord even in Canada, the arguments presented in their support deserve full consideration. Students of federalism will note his conclusion (p. 554) that "Federalism is a second best, and in Canada it must remain a second second best"; it must be admitted that the evidence for this verdict is of the most serious kind.

Since Professor Kennedy planned his work, events have told against his opinion (p. 500) "that political wisdom will allow the prerogative of disallowance to fall into disuse." The action of Alberta has been such as to induce the federal Government, however reluctantly, to intervene to prevent the commission of injustice detrimental to the financial status of Canada. It is, of course, true that the existence and exercise of the power lead to grave constitutional and practical complications, but emergent evils of unexpected character may demand the exercise of legal powers which seemed to be obsolescent. The episode throws light also on the decision of Canada to accept as still effective the right of disallowance by the Crown, on the advice of the British Government, of legislation touching on Dominion's loans admitted to trustee status in the United Kingdom; this acceptance, in itself open to constitutional difficulties, unquestionably strengthens the case for the right to disallow provincial measures which violate the principles of good faith. This attitude no doubt has aided the Dominion in receiving ready acceptance for the loans which it has recently raised in Britain. Perhaps the author is a little severe on Lord Atkin's statements in the judgment in the case of the Employment and Social Insurance Act, 1935 (p. 551). To use the federal powers as to public debt and property (British North America Act, 1867, s. 91 (1)) and as to taxation (*ibid.* (3)) to justify the creation of a system of compulsory unemployment insurance may fairly be regarded as a definite departure from the federal constitution and held to be invalid, though any statement of the principle of such invalidity is open to criticism. Nor is the attack on the Committee's interpretation of s. 132 regarding Empire treaties (pp. 551, 552) wholly convincing. When the Dominion was created, nothing was more natural than that the federation should be given power to implement all existing treaties incumbent on Canada, whatever their subject-matter, and also to implement any future treaties which might be concluded to bind Canada by the King on the advice of the British Government, after consultation by constitutional usage with the Canadian Government, on the assumption that the British Government would not deal with issues falling under provincial authority except on essential grounds. To transfer this power to treaties concluded by Canada under the powers of her new international status might have been a view taken by the Committee, but it would have been a bold step, rather legislative than judicial in character, and would have involved a definite departure from the established rules of interpretation; that these rules were wrongly adopted is certainly arguable, but to reverse them in 1937 would have merely added confusion, and have created dangerous dissatisfaction in Quebec and Ontario alike.[1]

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[1] *The Constitution of Canada*, 1534–1937 (second edition). By W. P. M. Kennedy. (Oxford University Press, 1938.) Pp. xxviii + 628. 25*s*.

The course of events which led from 1868 onwards to the development in the United Kingdom of a distinct sentiment in favour of the consolidation of the Empire, counteracting the earlier conviction that its disintegration must be the inevitable result of the concession of self-government, is traced at considerable length by Mr. J. E. Tyler of the University of Sheffield in *The Struggle for Imperial Unity* (1868–1895).[2] The ground has been in large measure covered in the *Studies in Mid-Victorian Imperialism* of Mr. C. E. Bodelsen, and in Mr. P. Knaplund's *Gladstone and Britain's Imperial Policy*, but a systematic exposition is not without value, especially when presented from the point of view of a supporter of the colonial policy of the late Mr. Joseph Chamberlain. Naturally enough, the author hardly appreciates the strength of the early opposition to preferential trade; Lord Salisbury, as his son explained in March 1905, was indeed prepared to consider the policy of retaliation, but he had no sympathy with Mr. Chamberlain's proposals, and the attitude of the National Union of Conservative and Unionist Associations threw very little light on the views of the members of these parties in Parliament. The wide conversion of the country to acceptance of imperial preference is due to causes which had hardly begun to operate in the period in question. There is no systematic bibliography, and there is much more in the book than is revealed by the index.

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[1] On p. 493, n. 1, read 1925 for 1936; on p. 549, last line, "not" is needed; as regards p. 557, the Bishop of Bradford's remarks in December 1936 were not regarded as "unctuous" by British opinion generally.

[2] *Royal Empire Society Imperial Studies*, No. 16. (London: Longmans, 1938.) Pp. viii + 219. 12*s.* 6*d.*

The Canadian Institute of International Affairs has rendered Canadians a great service in placing before them a clear statement of the factors, geographical, economic, historical, political and constitutional, which must be borne in mind when they decide for themselves what attitude in foreign affairs should be adopted by them.[1] As Dr. Dafoe in his Foreword insists, Canada has reached the position that her policies can no longer be determined by the British Foreign Office, nor can they rest on the security which for years the League of Nations was believed to present. Professor MacKay and Mr. Rogers have produced for the purposes in question a work of great accuracy, clarity of thought and expression, and objectivity. Moreover, all persons interested in the British Commonwealth as well as their immediate audience will find much of the highest value in the last part, which sets out objectively and very fairly the merits and disadvantages of the four alternatives in policy open to Canada: maintenance of her present policy of compromise and the evasion of responsibility as far as possible; adoption of isolation and non-intervention as guiding principles; the formation of a British front, or an effort to establish collective security. After examination of the conditions of Canadian political action, it is difficult not to concede that maintenance of the present policy of improvisation to meet emergent circumstances is inevitable for any political party which desires to retain or achieve power in the Federation.

The work is remarkably up to date, but even so it is probable that utterances of Mr. Mackenzie King later than those contemplated therein carry with them an implication that Canada now claims the right to be neutral in a British war, an issue discussed by the authors and on which a note (pp. 241–5) by Mr. Burchell, who goes farther than they do, is included. Mr. Burchell's legal contentions are open to some doubt; it certainly does not follow from the fact that Canada has had for many years the right not to take part in any war that she has a right to remain neutral; still less that a decision by the Governments in Britain and Canada, or by the Privy Council, that Canada had the legal right to neutrality would be recognized by all foreign countries. International law cannot thus be made by domestic arrangements or the pronouncements of domestic tribunals, and neutrality is a concept of international law. But Mr. Burchell is perfectly right in insisting that the arrangements for the use by Britain of Halifax and Esquimalt are inconsistent with the neutrality of Canada in a British war. They are, however, less precise than that with the Union of South Africa as regards Simonstown, and could more easily be terminated, following the example of Eire.

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[1] *Canada Looks Abroad.* By R. A. MacKay, Ph.D., and E. B. Rogers, M.Sc. (Econ.). (Oxford University Press, 1938.) Pp. xx + 402. 15s.

It is interesting to note that the position under which the Prime Minister holds also the portfolio of external affairs is criticized (pp. 201 f., 217 f.). But the separation of offices, though it has been tried in Australia, when Sir G. Pearce held office in charge of external affairs, and is now seen in Mr. Hughes's tenure of that portfolio, is open to considerable objection, and the chief difficulty, delay while the Prime Minister finds time to give decisions, could be reduced if ministers in Canada were persuaded to delegate authority more widely to their permanent staff or to accept the services of Parliamentary Under-Secretaries ; the objection to their creation in the Dominion is rather difficult to understand. It may be doubted also if the personal convenience of the King (p. 213) really counts for much in determining continuance of the use of the Great Seal of the Realm on diplomatic instruments for Canada ; so long as Canada is content to use the Privy Council to decide constitutional issues and the British Parliament to amend the constitution, the retention of the Great Seal in lieu of the creation of a new royal seal is natural enough. The substitution of a Canadian seal would not necessitate any additional burden to the King, who in any case signs only on authority of the Canadian Government, duly recorded in the sign-manual warrant authorizing the royal action.

The discussion of defence co-operation between Britain and Canada in Chap. XI is admirably illustrated by the events of 1938, when the Dominion Government declined in the interests of autonomy to contemplate the training of candidates for the British Air Force under British control in the Dominion, but offered to assist Britain by allowing training under Canadian authority, arranged with Britain for the supply to both Governments of Bren guns manufactured in Canada, and permitted British negotiations for the purchase of explosives and aeroplanes—acts helpful, but not pledging Canada in any way to active participation in British wars.

The Bibliography is inadequate, but there are valuable appendices giving the outstanding Canadian declarations on security and disarmament, the Sino-Japanese and Italo-Ethiopian conflicts, and statements in 1936–7 on foreign policy and defence, which add greatly to the value of the work. An unexplained bibliographical mystery is the fact that the book cover assigns it to Oxford, though it was printed in Toronto, and is published by the Oxford University Press in London, Toronto and New York.

A. BERRIEDALE KEITH.

THE STATUTE OF WESTMINSTER.

THIS is an excellent study[1] in which constitutional history and law and the interpretation of political events are blended to provide interesting reading. We must at once congratulate the author, not only on his factual accuracy, but on his skill in analysis, and on the general success of his legal arguments, which are remarkable in a writer who is not professionally trained. The style is at times pedestrian, and in places we have been conscious of an atmosphere somewhat metaphysical—perhaps not entirely avoidable in connexion with such a vague concept as " Dominion Status." The first chapter is given up to a rather commonplace account of " law," " convention " and " usage," but it can be pardoned as a background to discussions of developments of which the Statute of Westminster is a complicated and indeed obscure aspect. Mr. Wheare traces these developments generally both before and after 1926. He examines the Statute of Westminster in detail and in specific applications. Each division is written with care in reference and authority. There are evidences of wide reading and judicial approach—especially in relation to Eire.

The central difficulty with the Statute of Westminster is that it is far from clear in expression or in implication, and events have proved that it is practically unworkable as either a legal statement of unity or as a conventional support for it. For Canada, the Crown is apparently one. What of South Africa ? What of Eire ? Any attempt to fit the problems arising out of the abdication into anything like clarity in law or unity in action failed. I still believe that Canada in " requesting " and " consenting to " His Majesty's Declaration of Abdication Act, 1936, carried out a work of supererogation. First, I believe that s. 4 of the Statute of Westminster did not contemplate such action, and that the words " as part of the law in force in that Dominion " were inserted in that section for reasons quite different from those advanced by Mr. Wheare. In addition, executive authority is vested in Canada in " the Queen " (British North America Act, 1867, s. 9) ; and this provision, referring to " the Queen," extends " also to the heirs and successors of Her Majesty, kings and queens of the United Kingdom of Great Britain and Ireland " (s. 2). The federal legislature has been given no authority over succession to the throne ; and the B.N.A. Act itself is specially guarded from the ambit and scope of the Statute of Westminster. I submit that an Act of the Parliament of the United Kingdom dealing with the abdication dealt necessarily with the succession and would apply in law automatically to Canada under the British North America Act, thus eliminating legal action under s. 4 of the Statute of Westminster. Of course, this does not mean that the " assent " of Canada could be omitted from mention in such an Act were Canada to make such a request. The mention, however, would satisfy "constitutional convention" or "constitutional right" and would not flow from the demands of law. It is, however, impossible to decide these issues, and Mr. Wheare presents a case argued with skill and ability.

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[1] *The Statute of Westminster and Dominion Status.* By K. C. Wheare. (London : Sir Humphrey Milford, Oxford University Press, 1938.) Pp. xvi + 328. 10s.

We miss certain points which might reasonably have been included: the Regency Act and the Coronation oath. There is a good deal of obscurity in connexion with these. Does the Regency Act apply to Canada? Who changed the Coronation oath? Why were Sir John Simon and the Attorney so far from clear? I hope that in a new edition Mr. Wheare may be able to help. Meanwhile we congratulate him on a careful monograph, marred by no "complexes" either in history, outlook or judgment. It is well printed and indexed. W. P. M. KENNEDY.

MALAYSIA: A STUDY IN DIRECT AND INDIRECT RULE.

THIS book[1] is one of the most valuable contributions to a study of the Colonial problem that has appeared in print. The author has spared no pains to make himself acquainted with the histories of Malaya and the Netherlands Indies, and has had access to contemporary sources of information, both official and unofficial, which have enabled him to present and comment upon the political problems which face the administrators, both British and Dutch. The comparison of the British and Dutch methods of administration is carefully worked out, and may prove a useful guide to administrators in both spheres, both for the purpose of adopting methods which have proved successful, and for avoiding experiments which have failed.

Although Mr. Emerson is scrupulously fair in giving full credit for all the material benefits which have accrued to the native races as the result of European government, his whole outlook is tinged by a very strong anti-Imperialism. The author is firmly of the opinion that an alien domination over backward races can never really be justified, unless the Imperial Power sets itself out to educate the native races to such a degree that they will be in a position to replace the controlling power, that is, unless it deliberately sets out to sign its own death-warrant. With this prejudice at the back of his mind, the author prefers to speak of "exploitation" rather than of "development," and this frame of mind on occasion leads him into historical errors. He speaks of the natives having been long since "driven from the fertile lands on the coast." This statement, so far as Malaya is concerned, is historically incorrect. When British influence began to assert itself some fifty or sixty years ago on the mainland of the Peninsula, the coastal area was covered with jungle and mangrove right down to the sea. The Malay kampongs were situated on the rivers, and such cultivation as existed was on the river banks and adjoining swamps, where coconuts and small areas of rice provided a meagre living for the comparatively few indigenous inhabitants. The development by capitalist interests has been in jungle areas which the Malays never used, except possibly for hunting. Even before the Malay Reservations Enactments kampong lands were never taken over by companies formed for the purpose of rubber planting and only on rare occasions for tin mining, and the Enactments above referred to were introduced not to protect the Malays from European capitalists, but to safeguard them against the encroachments of Chinese middlemen and Indian moneylenders.

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[1] *Malaysia: A Study in Direct and Indirect Rule.* By Rupert Emerson. (London: Macmillan & Co. Ltd.) Pp. xii + 536. 21*s.*

The author, as I have said, sees the only ethical justification for imperialistic rule in a policy directed to teaching the natives to govern themselves. He recognizes, of course, that the problem is quite different in the Colony of the Straits Settlements (Singapore, Penang and Malacca), which are under direct Colonial Office administration, from what it is in the Malay States of the Peninsula, which enjoy different degrees of indirect rule (see p. 494). So far as Singapore and Penang are concerned, these islands were practically uninhabited when they were first occupied by the British. The Asiatic races who now form the bulk of the population came to these Colonies of their own free will. The population is predominantly Chinese, and even now a large proportion of the Chinese inhabitants is China-born. Such immigrants are not in a very strong position to complain of the form of government in the Colony in which they have chosen to take up their abode. The Malays in Singapore are also newcomers and, in any case, account for only 12 per cent. of the population. So far as is known, rice has never been cultivated in Singapore island, and the Malays form an unimportant section of the community: they are engaged mostly as motor drivers and messengers.

In the Malay States, on the other hand, before the British influence there was a large indigenous Malay population, and also a considerable Chinese population which had been working the tin areas for two or three hundred years. There were innumerable petty Malay chieftains, who usually had a " palace " which consisted of an erection of wood with attap (palm-leaf) roof, surrounded by a stockade at the river mouth, and a serviceable fleet of prahus (rowing-boats) manned by retainers armed with the kris (the long Malay knife). Their chief source of revenue was to extract toll from the Chinese tin miners who brought the ore to the sea. As there were no roads, this was the only form of transport. British diplomacy in course of time made treaties with the Sultans who gradually absorbed or replaced the various petty chieftains. Mr. Emerson complains that in the Federated Malay States the British Government have aggrandized the position of the Sultans merely for the purpose of erecting a specious façade behind which British rule is exercised as autocratically as it is in the Colony. To a certain extent this criticism is well founded, and there can be no doubt that if the Colonial Office wishes to introduce any special legislation or regulation in the Malay States it can do so as easily and effectively as it can in the Colony, although the forms used and the methods employed may be somewhat different. When, however, by treaty a Sultan is bound to accept the advice of his Resident in all matters, except those relating to the Mohamedan religion, it is obvious that there can be very little difference between a direct order given to the Government of the Colony and instructions given through the High Commissioner to a Resident who tenders "advice" which cannot be ignored.

The author has not, I think, given sufficient credit for the efforts made in the last ten years to associate the Malays in the Government of the Malay States. In the Unfederated States all the important administrative and judicial posts are filled by Malays with the assistance of a handful of European officers. In Kedah there is one European judge, and in Johore one European judge and one European magistrate. There is no European judge or magistrate in either Kelantan, Trengganu or Perlis. As regards the Federated Malay States, as the author points out, there was until recently a highly centralized form of Government under the Chief Secretary at Kuala Lumpur and the administration almost entirely manned by British officers. By 1933, however, the office of Chief Secretary was in course of being abolished and the personnel of the British Civil Service had been very greatly reduced. In many cases District Officers had been replaced by Malays, and there were practically no British Assistant District Officers. All these Malay officers exercised magisterial functions, and the only British magistrates remaining were those in the principal towns such as Kuala Lumpur, Ipoh and Seremban. Many impartial critics considered that this Malayanization had been too fast and had gone too far. Malay magistrates with little training and experience were given the powers of a first-class magistrate, which included criminal jurisdiction to the extent of awarding two years' imprisonment and a civil jurisdiction which was at least equal to that of the County Courts in England. In the result there were many complaints, especially from the Chinese, who suffered most. There was certainly ground for the criticism that the Malay officers were expected to run before they had been taught to walk. In view of these substantial, even though possibly misguided, efforts to associate the Malays in the government of the country, it is hardly fair on the part of the author to suggest that nothing has been done. At p. 496 he quotes Sir Frederick Weld as having said in 1880: "Nothing we have done so far has taught them to govern themselves. We are merely teaching them to co-operate and govern under our guidance. To teach men to govern themselves you must throw them on their own resources. We are necessarily doing the very reverse." The author in referring thereto says that these lines must still serve as the basis for a critical judgment at the present day.

The author, however, recognizes that the Chinese present a difficult problem in connexion with the carrying out of his ethical ideal of teaching the natives to govern themselves. In 1935, out of a total population for the Federated Malay States of 1,777,421, the Malays only numbered

643,003, the Chinese 717,614 and the Indians 327,917. The British administration has always taken up the position that the Malays are the indigenous inhabitants of the F.M.S. and that they alone should be associated with the British in governing the country. Even this has no sure historical foundation. The Malays are almost certainly immigrants within historical times, and the earlier inhabitants are the Sakais, a backward race which still survives in small numbers in the depths of the jungle. No one has suggested handing over the government of the country to them. But if the claims of the Malays are to be preferred because they have occupied the country to the exclusion of the Sakais whom they so greatly outnumber, the same argument might be applied in favour of the Chinese, who now outnumber the Malays. Theoretically there is just as much to be said in favour of educating the Chinese to govern the Malays as of educating the Malays to govern the Chinese. This is a problem which the author has not attempted to solve. Logically, he ought to suggest that the Imperial power educate the Malays, Chinese and Indians to govern themselves and each other in association, but as it is quite obvious that no such scheme would possibly work, the problem is left without a solution. It is difficult to see what other policy could be pursued by the Imperial Government than that which it actually pursues for the purpose of maintaining the rights and privileges of the various sections of the community, and ensuring them equality in the eyes of the law. The burden of Empire, however it originated, is there, and the author has not adumbrated any scheme by means of which it can be laid down, without doing the gravest injustice to part, and probably the larger part, of the population which now lives under Imperial rule.

In putting forward these criticisms I do not wish to suggest that this book is not well worth a careful study. The views of an outsider, who has had the industry and opportunity not only to study on the spot the problems confronting British and Dutch colonial administrators, but also to present them in such a lucid and readable form, are bound to be of value to the officials concerned, and of the greatest interest to the general reader.

A. K. à BECKETT TERRELL.

CHINA'S CONSTITUTIONS.

DR. HAI-CHAO CHIANG has attempted[1] to trace China's constitutional evolution from the last days of the Manchu dynasty down to the present time. There is ample material, for since 1911 China has run the whole gamut from military despotism of a local character to advanced parliamentarianism, with alternations between federal and unitary constitutions. Several of these constitutions, as a perusal of successive *China Year Books* will abundantly show, existed only on paper. After the first effort at parliamentary democracy broke down in 1915, constitutions acquired a propaganda value, but little else, until the Nationalists re-unified China in 1928. Thereupon new theories of government, based upon Dr. Sun Yat-sen's *Three People's Principles*, held sway. China was to advance towards a new type of social democracy by successive stages, whilst the people was being educated by the Kuomintang Party in its new responsibilities. Considerable progress to this end had been made when hostilities broke out last year, and when the Japanese threat to Chinese unity has been removed, no doubt progress will be resumed. Meanwhile, the Chinese constitution is most obviously in a state of transition, and its final state is difficult to predict. It will not be an imitation of Western models, as at one time seemed likely. Chinese Nationalism will evolve a form of its own, in which traditional Chinese institutions will no doubt reappear with new functions. Accordingly, most of what the present author writes about the constitutions which preceded the Nationalist advance of 1927 has little permanent interest or importance. It serves merely as an introduction to his account of development under Kuomintang auspices, which, as is pointed out above, is as yet by no means complete. Moreover, it should be emphasized that this is a study of documents rather than of institutions. Thus, there is no discussion of the relations of provincial authorities to the Central Government in relation to loans and grants, except in so far as these matters may have been included in the successive constitutional drafts; and the status of Shanghai is never touched on at all, even in a footnote or an appendix. Furthermore, the list of authorities given in the Bibliography is very incomplete. Apart from Chinese texts, only a few monographs in German appear to have been consulted, notwithstanding the fact that a number of valuable articles have appeared from time to time on constitutional questions in English, French and American reviews and quarterlies, as well as in the *Chinese Social and Political Science Review* and in the *China Law Review*, none of which is even cited.

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[1] *Die Wandlungen im chinesischen Verfassungsrecht seit dem Zusammenbruch der Mandschu-Dynastie.* (Berlin: Carl Heymanns Verlag.) Pp. xiv + 306. RM. 22.

G. W. KEETON.

LEGAL STATUS OF ALIENS.

THIS valuable compilation[1] consists of essays on immigration law and practice and the law of the status of aliens in Australia, Canada, China, Indo-China, Pacific dependencies of Great Britain, Japan, Netherlands India, New Zealand, the Philippines, the U.S.A. and the U.S.S.R. Central and South American countries are justifiably omitted; the omission of Manchukuo is less justifiable. The nineteen contributors maintain a high standard of competence. Professor K. H. Bailey's short essay on the legal position of foreigners in Australia is conspicuous for its wise classifications, and Professor J. P. Chamberlain's paper on the United

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[1] *The Legal Status of Aliens in Pacific Countries.* An international survey of law and practice concerning emigration, naturalization and deportation of aliens, and their legal rights and disabilities. Edited by Norman Mackenzie, Professor of International Law at the University of Toronto. A report in the International Research Series of the Institute of Pacific Relations. (London: Sir Humphrey Milford. Oxford University Press, 1937.) Pp. xii + 374. 21*s*.

States for the skill and delicacy with which it expounds a vast subject. Two contributions seem, in the light of actualities, a little hollow—Professor Ming-Chien Bau's account of the status of aliens in China apart from extraterritoriality, and Professor Plotkin's article on the Soviet Union.

Immigration law and practice are matters of interest to political and social scientists rather than to lawyers. The juristic machinery by which aliens are excluded varies widely, and occasionally gives rise to splendid technical complexities. For comedy and legal interest the Kisch case in Australia, which is appreciatively described by Professor Charteris, wins easily. But not one intending immigrant in a million is a Kisch, and the general upshot of these diverse enactments is that, in every Pacific country except China, the executive may exclude whom it will.

It is useless to hope that sovereign nations, especially Pacific nations, will in our time agree on common criteria for exclusion of aliens or even on common standards of administration of immigration laws. But it is perhaps not altogether utopian to think that civilized nations ought to be able to observe a common minimum standard in the treatment of those of each other's nationals whom they do admit within their frontiers. Minority conventions on European lines are probably not advisable and certainly not practicable in the Pacific. What is more possible is that the international opinion of jurists may some day arrive at a consensus upon a few simple rules of natural law defining the maximum discrimination decently permissible between citizens and aliens. Professor Mackenzie's wise and moderate introduction is a valuable first essay towards this end From this point of view, Professor Angus's article on the status of Orientals in British Columbia makes the most depressing reading. Where in a federal system private law is left to the local units, and not subjected to control under the federal external affairs power, irresponsible local anti-foreign feelings are apt to secure expression in unconscionable legislation. Some British Columbian statutes might have served as precedents for the Nuremberg Laws ; Australian States are, by comparison, enlightened.

The decisions of the Supreme Court of the United States on immigration and deportation have been criticized, perhaps more than they deserve. But there is no department of its work which does it more credit than the doctrine which it has built up concerning resident aliens. In consequence of fundamental law provisions, as interpreted by the Supreme Court, resident aliens participate in practically all the private rights guaranteed to American citizens. They even enjoy some privileges, notably that of having many kinds of cases in which they are involved removed, if they wish, to the Federal Courts ; and many State laws imposing economic discrimination on the ground of race have been held invalid. The Soviet Federal Constitution explicitly prohibits and penalizes discrimination on ground of race. It is a refreshing thing to find in a totalitarian country even the statement of such a principle.

Indo-China has a rather enlightened system of communal responsibility for immigrants. Status in the Netherlands Indies depends on domicile rather than on nationality. In the Philippines, where political autonomy has been quickly achieved by a people that feels itself weak in political and military power, the old common law rule against landholding by aliens is in full force. The treatment, in five articles, of Canadian law and practice is exhaustive and admirable. It is a pity that the date at which each article was written does not appear.

The publication of works like this is only rendered possible by the existence of institutes for the study of international affairs, and is one of their chief justifications. Professor Mackenzie, who has taken six years over his task, is to be congratulated on having carried it through with such general success. R. T. E. Latham.

JUSTICE UNDER THE QUEBEC ACT, 1774.[1]

This is a competent and careful study of a subject which bristles with difficult points. The main documents for the period 1759–91, which closes with the creation of Upper Canada as a separate province, have been admirably edited by Shortt and Doughty in *Canadian Archives*. But their volumes give only selected papers. There is a mass of unprinted material in the Public Archives of Canada, and Miss Neatby's study is based mainly upon this. She has found plenty of valuable gleanings, and she has contrived with great skill to work up the results into a readable book.

The main theme is the unsatisfactory nature of the administration of justice at this time, and she has made it abundantly clear that it was bad enough. Many causes contributed. The country was poor, and could not afford to pay salaries sufficient to tempt suitable lawyers to accept judgeships. Many of the judges were not lawyers at all. Mabane, by no means one of the worst of them, was a retired army surgeon. Dunn was a merchant, Fraser a half-pay captain.

Moreover, there was a long-protracted wrangle in the country upon the fundamental question of what law ought to be administered. Twelve years after the Quebec Act had declared that the laws of Canada should apply in civil matters to *all* His Majesty's Canadian subjects, a newly appointed Chief Justice (William Smith) succeeded in persuading a majority of the court of appeals to give a judgment which involved the acceptance of the theory that under this Act the English settlers were still to enjoy the English law. In civil matters the French Canadians were to be governed by French law and the English by English law. Smith's report on this matter to the Under-Secretary of State makes his position clear.[2] Such an interpretation of the Act was preposterous, but it expressed a view for which the English settlers had argued in season and out of season.

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[1] *The Administration of Justice under the Quebec Act*. By Hilda M. Neatby, Regina College, University of Saskatchewan. (London: Sir Humphrey Milford, Oxford University Press.) Pp. 383. 27*s*.

[2] *Canadian Archives* 1759–71, pt. ii, p. 841. The case is *Gray* v. *Grant*, January 7, 1787.

My only criticism of Miss Neatby's excellent book is that she does not seem to realize that one of the wisest things ever done by the British Government was to leave the French law in force in Quebec so far as civil matters were concerned. The introduction of English criminal law caused no dissatisfaction.

It must be remembered that in 1774 the English settlers were a mere handful, probably not more than 5 per cent. of the population. Yet this little minority were always clamouring that the English laws and the English language ought to prevail.

Governor Murray, who at times expressed himself with soldier-like frankness, described these agitators as "licentious fanatics" in a "Letter to the Lords of Trade," and said: "Nothing will satisfy them but the expulsion of the French Canadians." Fortunately the English law officers were not misled.

Thurlow, Att.-Gen., in his report of Jan. 22, 1773, adopts the wise language of Att.-Gen. C. Yorke and Sol.-Gen. William De Grey in their Report of April 14, 1766. "There is not a maxim of the common law more certain than that a conquered people retain their ancient customs till the conqueror shall declare new laws. To change at once the laws and manners of a settled country must be attended with hardships and violence. And, therefore, wise conquerors, having provided for the security of their dominions, proceed gently, and indulge their conquered subjects in all local customs which are in their nature indifferent, and which have been received as rules of property or have obtained the force of laws. It is the more material that this policy should be pursued in Canada, because it is a great and ancient colony, long settled and much cultivated by French subjects who inhabit it in the number of eighty or one hundred thousand." The Quebec Act gave effect to this view.

That its policy was just is hardly questionable. That it was expedient has been shown by the experience of more than a century and a half. The opposite policy would very likely have driven the Canadians into the arms of the American revolutionaries. If this had not happened, they would have remained a discontented people.

Instead of that the policy of wise tolerance has made them as loyal subjects as can be found in the British Dominions.

The French Canadians—a sturdy stock—show no signs of race suicide. From 65,000, or thereabouts, in 1763 they have grown to about 5,000,000. Of these 2,000,000 are outside Canada, mainly in the United States. In spite of this exodus, the high birth-rate of the French Canadians makes it quite possible that in thirty or forty years they may form the majority of the population of the Dominion.

F. P. Walton.

THE LAW OF TORTS IN THE PROVINCE OF QUEBEC.[1]

A GENERATION ago, it was not uncommon in Canada for judges, as well as for practising members of the Bar, to assist in the law teaching of the universities. The late Mr. Justice Wurtele of the Court of King's Bench was at the same time Professor of the Law of Real Estate in McGill University. His heirs had the happy thought of presenting to the Faculty of Law there a sum of money to be used for a purpose that would worthily commemorate the judge. The Faculty decided to make this gift the nucleus of a fund for publication. Candidates for the degree of Bachelor of Civil Law must present a thesis, and the Faculty proposes from time to time to defray the cost of publishing in a revised form the most suitable of these studies.

The present essay is *McGill Legal Studies, No.* 1. It may be said at once that this work is so good that it will be difficult, one would suppose, to keep up to this standard. It is a solid contribution to the study of a most important subject, and is marked by clear writing, good logic and a commendable independence of judgment. It will be useful to the practitioner as well as to the student. The Quebec cases and the French authors have been carefully studied, though it is odd to find no reference to the massive work of the brothers Mazeaud.

To the student of comparative law, the law of Quebec is of peculiar interest because of its composite character. The criminal law is based on English law, and so is the bulk of the commercial law which is governed by federal statutes. Even in the field of civil procedure there is a large infusion of English law, and purely English remedies, by way of writs of injunction, mandamus and prohibition, have been imported. Nor is this the whole story, but it is enough for the purpose here. But the law embraced in the Civil Code—persons, property, contracts, torts, succession, etc.—is of French origin. The " common law " is the old French law as it was before the Cession. The Civil Code which came into force in 1866 is very similar to the French Civil Code, though with many differences.

Considering the long history of the law of Lower Canada, and its practical importance as governing more than three million people, its legal literature is rather meagre. For this various reasons may be suggested. The main one is that the French books are so good. They have to be used with caution, it is true, on account of the differences in the codes, but used, as they are, *mutatis mutandis*, they are an invaluable aid to the Bench and Bar of the Province. Another reason is that, speaking broadly, the young lawyer in Montreal, let us say, is pretty fully occupied. There is no separation of the profession into two branches, and the young lawyer generally goes into some firm where there is plenty of work for him from the start. It would be interesting to know how many of our law books are the fruits of the enforced leisure of young barristers.

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[1] *The Responsibility for Offences and Quasi-offences under the Law of Quebec.* By George V. V. Nicholls, B.A., B.C.L., of the Bar of Montreal. (Toronto: The Carswell Co. Ltd., 1938.) Pp. 164.

Treatises on special parts of the civil law are few in the Province of Quebec, and this makes it the more desirable to encourage their publication, as the Faculty is doing in this way. Mr. Nicholls is, quite properly, jealous of the integrity of the Quebec civil law. Two dangers always threaten it. There is the risk of English doctrines creeping in, as they sometimes do. And there is the risk of the law of Quebec following too slavishly the decisions of the French courts. For example, upon the thorny question as to the liability for injuries done by the instrumentality of a " thing," the French courts have broken with a secular tradition. Must the Quebec courts, interpreting very similar words, follow suit ? So far they have, to some extent at least, held out. The Belgian courts, applying a code practically identical with the French code, have managed to preserve their own view on a good many important matters.[1] The Quebec courts are no less jealous of their independence, and have, possibly, an even greater attachment to the old French law. F. P. WALTON.

A DIGEST OF ENGLISH CIVIL LAW.

THIS work [2] cannot be fully appreciated unless the peculiar character of English law is taken into account. When the law is codified the principle governing a given case can be looked up in the Code or in its Commentaries. When customary law plays an important part in a legal system, scientific works are generally regarded as true sources of law, and the lawyer being familiar with the arrangement of these books will encounter little difficulty when he seeks for the determination of a question under the appropriate heading. But as English law is based on an immense number of scattered precedents and an ever-increasing quantity of enactments not forming an organic body, the ascertainment of the law becomes a much more difficult problem. Its solution presupposes the existence of multifarious publications (reports, digests, compendia, textbooks, chronological tables, etc.). Looked upon from this angle the Digest seems to be most fit to facilitate the ascertainment of English law. It will be used far beyond the limits of the British Empire as a reliable guide for foreign lawyers. It has already been translated into French and German. The work is a type of its own. Unlike other digests which consist of a long series of volumes dealing with decisions of the courts, this book contains a survey of the whole English civil law within two volumes of a moderate size. The whole of the material is split up in 2218 paragraphs. The relevant authorities (precedents and statutory provisions) are quoted and many obscure points are elucidated by notes. The comprehensive tables of cases and statutes and an excellent index are worth special attention. The work is of an admirable completeness. Many hitherto neglected institutions are explained and principles which are as a rule dealt with only incidentally are put in a better light. Thus, the particular contracts which are omitted in most textbooks on contracts (Chitty's work is an exception) are fully discussed. Ten paragraphs are devoted to the contract for work and labour, while this contract is elsewhere generally mentioned only to make clear the nature of other contracts (*e.g.* contracts of service) by distinguishing them from it or to contrast the liability of an independent contractor and that of a master for his servant.

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[1] See *Journ. Comp. Leg.*, Third Series, vol. xiv, p. 157.

[2] *A Digest of English Civil Law* (third edition). By Professor Edward Jenks (Editor), the late Professor W. M. Geldart, Professor R. W. Lee, Professor Sir William S. Holdsworth, Sir John C. Miles, William Latey, Barrister-at-Law. (London : Butterworth & Co., 1938.) Two vols., pp. cclxvii and xi + 1258, 70*s*.

Moreover, lawyers interested in legal science or comparative law will look on the work also from another aspect. There is a divergence between the arrangement of the Digest and that of ordinary English law books. The Digest is not a code, as the Editor points out in the " Prolegomena." Nevertheless this Digest takes the form of a code and resembles most of all the German BGB. In these circumstances the question arises how the authors have overcome the difficulty of dealing with their subject in an unusual way. The most striking phenomenon is the fact that the work has a general part (Book I). Such a general part is not even common to the codifications, the French Code Civil lacking it. The general part of the German BGB embraces two different types of subjects, namely some institutions of general importance, *e.g.* persons, legal capacity and self-help, and some general rules applying to a number of institutions, *e.g.* principles concerning things, *Willenserklärung* (expression of the intention to create legal relations), conditions, stipulations as to time, limitations of actions. It was relatively simple for the Editor to remove such subjects as persons, legal capacity and self-help from the special branches of the law and to incorporate them in a general part. On the other hand, the extraction of general principles from the different branches of English law is a somewhat precarious task. The Editor was well aware of this fact, as he says himself in the Preface to the third edition : " It is typically English to avoid generalizations." We will confine ourselves here to the discussion of the section which deals with " declaration of intention," being obviously the counterpart of the German *Willenserklärung*. This is a unilateral legal act and differs so far from the notion of contract. According to the ordinary English view, the circumstances affecting the reality of consent, such as mistake, fraud, duress, relate to contracts ; while in German law they are connected with the *Willenserklärung*. The Editor has departed from the English view by treating mistake, fraud, innocent misrepresentation, undue influence and duress under " declaration of intention." It remains to be seen whether this course will be regarded by English lawyers as an example to be followed.

The arrangement of Books II–V (*Obligations*, *Property*, *Family Law*, *Law of Succession*) lies midway between the English and the Continental method. Family law and law of succession as a distinct branch of the law apart from property law are Continental conceptions. On the other hand, Book III (*Property*) has been built up mainly on English lines. Something may be said here about the treatment of bankruptcy. This is regarded in English law as a kind of involuntary transfer of property and therefore as a topic of property law, while it belongs in French law to mercantile law and in German law to adjective law. As the different species of property—land, chattels corporeal and choses in action—as well as their involuntary alienation are dealt with in the Digest separately, the rules regarding bankruptcy, which is concerned with each of these species of property, are scattered through the different parts of Book III. We allow ourselves to suggest that in a later edition Part IV of Book III, which contains some general principles of property, should be enlarged so as to include bankruptcy under a heading of its own.

This review cannot be better summed up than by expressing the conviction that the Digest ranks among the best works of legal literature.

HANS W. GOLDSCHMIDT.

THE LAW OF GAMING.

WHETHER gambling is an insuppressible instinct in the human race or not, there is no doubt that it is an extremely difficult subject for legislation. The various forms have provided occasion for a series of Acts of which the interpretation has given a good deal of trouble to the courts. Mr. Street has set himself the task[1] of attempting—for the first time, he claims—to *understand* (the italic is his) the law of gaming. His experience in India has led him to appreciate the value of codification, and so his work takes the form of a series of " propositions." As a foundation Mr. Street has paid attention to the history of the subject, and in doing so has also taken cognizance of the surroundings at the time of the enactments and the decisions upon them. To complete this scientific study of the subject Mr. Street hoped to include a comparison with the law of the Dominions if not with the laws of Europe, but this scheme proved to be impracticable on account of the bulk of the matter requiring attention. From the information collected he has compiled an appendix somewhat curiously including under the title of " Foreign " law Canada, the Isle of Man, Jersey and New Zealand as well as various European countries.

Perhaps the best example of the general treatment of the subject is provided by the section dealing with lotteries. The earliest record of a lottery drawing for a consideration appears to have been in the Low Countries in the middle of the fifteenth century. The money was raised for a national purpose and England followed suit, though without much financial success, in the reign of Queen Elizabeth. The early settlement of Virginia was aided by lotteries, with legislative sanction. They were the means of sending eight hundred colonists who otherwise might never have entered the plantation. On both sides of the Atlantic lotteries have been promoted under distinguished patronage to finance undertakings of national importance. Dr. Seabury, who is remembered as the first bishop to be sent to the United States, also has the distinction of having recorded in his diary " thanks and praise to Almighty God " for winning a prize of £500. Such an incident exemplifies the extent to which public opinion has changed at different periods on the subject of lotteries and gambling generally. The manners and customs of the time cannot fail to have their effect upon the judiciary, however strict may be their adherence to the principle of giving only a legal interpretation of the question submitted to them. Lotteries and other forms of betting and gambling have been singularly susceptible to fluctuations of public opinion, so that consistency can hardly be expected in the judicial decisions, and precedents do not give the same assistance as in other departments of law.

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[1] *The Law of Gaming*. By Howard A. Street. (London: Sweet & Maxwell.) Pp. lxviii + 760. 42*s*.

Although the Betting and Lotteries Act, 1934, was an attempt to enact legislation according to the mind of the people of the present day, it requires reference to be made to earlier Acts, and in its interpretation use has to be made of decisions belonging to periods when circumstances were quite different. Nevertheless, it is an endeavour, so to speak, to make a fresh start. It enacts that " all lotteries are unlawful " and at the same time includes important exceptions described as private lotteries. The main point in the organization of lotteries, to which public opinion has taken exception and which has consistently found expression in legislation, is the extent of the private gain to the promoters. Subject to this condition, the principal problem presented by the Act of 1934 is to conduct a lottery in accordance with the stringent conditions laid down in it. Ever since it came into operation charitable undertakings have been endeavouring to create the machinery with the safeguards necessary to ensure compliance. The Act of 1934 applies to Scotland. Legislation in Ireland followed broadly on the lines of English law until the National Sweepstake was authorized in 1930.

Mr. Street's summary of foreign laws does not include any reference to the laws of the United States, where lotteries have recently been receiving a good deal of public attention. The trade depression had a serious effect upon the box-office receipts of the cinemas. A Colorado theatre manager invented an ingenious scheme, known as " Bank nights," by which he hoped to evade the lottery laws forbidding any device to allot by chance anything of value for a consideration. Anyone entering the theatre and recording his name and address, whether purchasing a ticket for admission or not, was entitled to participate in a draw which took place weekly on the stage for money prizes. The scheme spread like wildfire through the States of the Union. Mr. George E. Palmer, in the *St. John's Law Review* (November, 1937), surveys the numerous decisions which resulted from action being necessary in each State. Tennessee, California, New Hampshire, New Mexico and Iowa regard it as a lawful enterprise, while Kansas, Michigan, Massachusetts, Illinois, Wisconsin, Texas, Georgia, Washington and Alabama condemn it as illegal. Admittedly the scheme was for the purpose of increasing the number of patrons of the entertainment. The latter jurisdictions, therefore, held that the increased number of patrons paying admission to the theatre on the night of the drawing furnished, *en masse*, the required consideration. The laws of the various States are opposed to lotteries on the lines of the English law. Nevertheless, human nature being what it is, " so soon as a particular scheme is declared by a decision of the court to be a lottery," as Humphreys J. observed in *Coles* v. *Odhams Press*, [1936] 1 K.B. 416, " the skill and ingenuity of a number of extremely able persons will be exercised in trying to discover some means of avoiding the effect of that decision." Mr. Street's able exposition of the law will be an indispensable aid in all those jurisdictions where English law is received with respect to all who have the duty of defeating such attempts in this or any other branch of the law of gaming.

C. E. A. B.

THE LAW RELATING TO DESIGNS.

MM. Greffe and Casalonga are both authorities on the law relating to designs, and are too well known in France to need introduction. In the work under review [1] they have undertaken the difficult task of compiling and interpreting all the relevant laws dealing with designs, including those of the remoter countries. The book is the first of its kind in that it affords lawyers the opportunity of acquainting themselves with the laws of other countries in a concise and eminently readable form. As may be expected, French law occupies first place, and the section dealing with the laws of France is as complete as can be desired. The arrangement adopted throughout the book is chiefly designed to assist the practitioner. It sets out the relevant provisions of the statutes in the respective countries, the objects to which the protection of these statutes extends, the persons who are afforded protection by them, their rights in case of infringement and finally a full account of the relevant international conventions, including a list of all countries adhering thereto.

The account of English law is complete and dependable. As regards the law of procedure, however, it may be suggested that this be dealt with more fully in later editions. The same applies to an even greater extent to American law, in which the rules of procedure vary in the different States. It not infrequently happens that cases are lost through wrong steps of procedure being adopted, and many a lawyer has learnt to his own detriment the importance of the rules governing procedure.

It may be of interest to make a few observations on the views expressed on English substantive law. On pp. 409–10 attention is drawn to the distinction between designs registrable under the Patents and Designs Acts, 1907–32, and designs registrable under s. 22 of the Copyright Act,

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[1] *Traité des Dessins et des Modèles* (second edition). By Pierre Greffe and Alain Casalonga. (Paris: Librairie Dalloz, 1937.) Pp. viii + 628. Frs. 80.

1911. It is interesting to note that in a small number of cases the right to registration can be obtained both under the former Acts and under s. 22 of the Copyright Act, 1911. This may be inferred from the wording of s. 22 in conjunction with s. 58 of the Patents and Designs Act. The application of a registered design to a certain purpose is not compulsory, the right of the grantee being simply restricted by the provisions of s. 58 of the Acts of 1907–32.

On p. 413 the authors rightly point out that the term " design " as understood by English law comprises the terms " *dessin* " and " *modèle* " as understood by French law. The question is also examined as to whether there can be a right of ownership in registered designs. The difficulty of determining this question lies not so much in its practical consequences as in the fact that Continental lawyers are often confused by the terms " ownership " and " property " as used in English textbooks and statutes.

The book deals fully with questions relating to disclosure prior to publication and actions for infringements. As regards the former, the recent case of *Kangol* (*Manufacturing*) *Ltd.* v. *Centrokomise* (*London*) *Ltd.* ((1937) Rep. Pat. Cas. 211) is of particular interest. As regards the latter, it is pointed out by the authors that the onus of proof at the trial varies according to the status of the defendant. If he is the manufacturer of the design, the plaintiff need not prove " *scienter.*" If, on the other hand, he only exposes the infringing article for sale, the plaintiff is bound to prove knowledge of infringement. It might usefully have been added that in both cases " *scienter* " is of great importance as affecting the measure of damages recoverable.

The most fruitful field for a comparative study of the law relating to designs is the problem of " novelty." Investigation shows that French law as set out on pp. 87 *seq.* of the book is considerably more liberal than our own. English law is reluctant to regard " arrangements " as a proper subject-matter of designs, whereas French law is ready to grant registration for a new combination of known components. Colour *per se* may be a novelty according to French law ; according to English law, on the other hand, it does not constitute a novel design (*In the matter of an application for the registration of a design by Associated Colour Printers Ltd.* (1937) Rep. Pat. Cas. 203). The same applies to buildings and structures (*In the matter of applications for the registration of designs by R. H. Collier & Co. Ltd.* (1937) Rep. Pat. Cas. 253). These instances could easily be multiplied, and they show that investigation on comparative lines is needed and may be of great interest.

It will be seen from this short account that the work of MM. Greffe and Casalonga deals with all the relevant questions, and there can be no doubt that it will prove to be of great assistance to English lawyers and in particular to those who specialize in the law relating to designs.

F. HONIG.

CONSTITUTIONAL LAW OF ENGLAND.

THIS,[1] the sixth edition of Ridges, is the second for which Professor Berriedale Keith has accepted responsibility. The book fully maintains its reputation for containing more accurate and detailed factual information about the older institutions of government than any other single volume, and it is happy in its editor, who has an unrivalled knowledge of the details of these institutions. He has enriched from his own special field of learning the chapters on the imperial aspect of the Constitution, though in this sphere the student of public law is bewildered at the continued inclusion of an important branch of administrative law (the general scheme of local government in England and Wales) as a close bed-fellow of Dominion Status—a criticism which we also made of the editor's edition of Anson.

We do not propose to review the detailed additions to this well-known work. Indeed, it would be difficult to find any new topic which has escaped attention. We are more concerned to ask whether the book makes possible for the student a grasp of the real nature of the constitution of 1938. The answer unfortunately must be in the negative. This is due partly to the fact that the arrangement of the book, in common with similar works, follows the old tradition more appropriate to the eighteenth than to the twentieth century of paying regard chiefly to the older and " more showy " (as Maitland once called them) parts of the Constitution, and partly to the scanty treatment given to the nature of constitutional conventions (pp. 3–6). We believe that the traditional arrangement is now obsolete and that the complex machinery of administration ought to be presented to the student as a part of administrative law. This is admittedly an argument for inviting Dr. Keith (and most of his colleagues in this sphere of law) to write yet another book on the Constitution, rather than a reflection upon his painstaking work as editor of Ridges.

The Preface states that the classical doctrine of the rule of law must now be modified and due recognition accorded to administrative law as an essential part of constitutional law. Due recognition is afforded by the admission (p. 1) that it is logically impossible to distinguish administrative from constitutional law (this was the case also in the fifth edition), and by the acknowledgment that *contentieux administratif* is only one aspect of administrative law (p. 32). It is therefore somewhat startling to read the new matter on pp. 25 and 26, and in particular to learn that the rule of law includes " the rule that legislation must favour the limitation of executive and judicial power to deal arbitrarily with individual rights." The whole emphasis of legislation to-day is in the contrary direction and seeks to regulate, at the discretion of the various organs of administration, private rights which the common law jealously guarded. It is no answer to say that special power has always to be sought from Parliament, because as Professor Keith says, the executive, *i.e.* the administration, can obtain all necessary powers from Parliaments if need be. There is little in this chapter to tell the student that discretion as exercised by an administrative body is not an alternative word for illegality, but a regular and perfectly legal method of administration, whether by an official or a judge. E. C. S. WADE.

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[1] *Ridges' Constitutional Law of England*. Sixth Edition. By A. Berriedale Keith. (London: Stevens & Sons, Ltd., 1937.) Pp. 50 + 642. 21*s*.

CONSTITUTIONAL LAWS OF THE BRITISH EMPIRE.[1]

IT is rarely possible to be enthusiastic over a work avowedly written to fulfil the requirements of a particular examination ; for there is always a doubt whether the writer's inclination will not be rather to ensure his reader's success in the examination than to make him understand his subject. The two objects need not, logically, be incompatible ; as a matter of practice, in this illogical world, they frequently are.

But when two important educational bodies prescribe for a single examination paper the roomy subject of *The Constitutional Laws of the British Empire*, there is rather more than an excuse (perhaps even a duty) for a well-known and respected teacher to formulate something like a canon of interpretation, by writing a book which shall be accepted, both by examiners and by students, as a reasonable gloss on the examination statutes. For, if the title of the subject were interpreted in its narrowest sense, it would be assumed to include only those laws (if any) which apply to the British Empire as a whole ; if in the widest, it might include every rule which directly affects the government of any one of the sixty or so communities which owe allegiance to the British Crown, and to many millions of persons who are not British subjects at all. Both of these extremes would be unpractical ; and, in the absence of more precise information from the prescribing authorities, there is little doubt that the book before us will be gratefully welcomed by those for whom it is intended.

The form of the book, though not at first sight attractive, has much to be said for it. The obvious suggestion is to compare it with a famous work, well known to several generations of law students, *viz.* Stubbs's *Select Charters and Other Illustrations of English Constitutional History*, also published by the Clarendon Press ; for it is composed of two distinct parts, *viz.* a series of brief introductory essays by Dr. Jennings and a selection of excerpts from original documents (mostly statutes and reported cases) by the late Miss Young, put together in consultation with him. But there is one rather striking difference between the *Select Charters* and *Constitutional Laws*, *viz.* that in the latter, the documents come together in seven large groups, each preceded by a single essay which they are intended to illustrate, while in the former, which includes documents not, in the strict sense, authoritative, each document is preceded by its own brief introductory note. The difference is, of course, accounted for by the fact that Dr. Stubbs's *Charters* is intended to be read alongside his monumental treatise on English Constitutional Law, while Dr. Jennings' book stands on its own feet.

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[1] *Constitutional Laws of the British Empire.* By W. Ivor Jennings, M.A., LL.D., Reader in English Law in the University of London, and the late C. M. Young, M.A., LL.B., of the Middle Temple, Barrister-at-Law. (London : Sir Humphrey Milford, Oxford University Press. Oxford : At the Clarendon Press, 1937.) Pp. xviii + 364. 18*s*. net.

There is another difference between the work of Dr. Jennings and that of his predecessor. Given the necessity for a somewhat drastic limitation of topics, Dr. Jennings has made what may appear to some readers a rather arbitrary selection. His seven groups are (1) The Jurisdiction of the Crown; (2) The Constitutions of the Empire; (3) Dominion Status; (4) The Dominion Constitution of Canada; (5) The Constitution of the Commonwealth of Australia; (6) The Union of South Africa; (7) The Federal Constitution of India. But whereas the documents appended to each essay consist entirely of reports of cases, there is a sort of General Appendix, entitled *Extracts from Constitutional Documents*, which consists of a small and rather arbitrary selection of statutes, and might, it would seem, have more conveniently been split up among the essays. The arrangement adopted is slightly reminiscent of the sailor's famous three wishes; though one may acquit Dr. Jennings of the want of imagination betrayed by the sailor.

In his essay on the Jurisdiction of the Crown, Dr. Jennings takes a cautious, and, in our opinion, a sound line. The Crown is neither an individual, nor a metaphysical abstraction, but an institution which, in the vast majority of cases, acts through various agencies. Some of these agencies (*e.g.* the Privy Council) are themselves institutions, but most are individuals coming under the broad description of Representatives of the Crown; and, especially having regard to recent developments, the most important of the direct actions of the Crown is now, probably, the choice of the right agency for conveying its authority. It is here that the individual action of the wearer of the crown finds its greatest responsibility. As distinct from the much wider scope of the Prerogative, which is, in the vast majority of cases, exercised on the advice of Ministers, this responsibility of choice of agencies must, in modern conditions, at any rate so far as the Dominions are concerned, be exercised by the King in his individual judgment. For it would obviously be clean contrary to the spirit, if not to the letter, of the Statute of Westminster for the King, on the advice of Whitehall, to reject the formal recommendation of his Ministers in Canberra, in a matter clearly within the legal powers of the Australian Constitution; though that is not to say that the fact that he knew the recommendation to be gravely distrusted by Downing Street might not weigh substantially with him in exercising his individual judgment. The doctrine of "the unity of the Crown," which is illustrated by a number of cases quoted in the book, seems to find here no difficulty; in fact, it may almost be claimed as its highest expression.

Dr. Jennings's essay on the Constitutions of the Empire rightly dwells on the enormous variety of governmental institutions to be found within the Empire; and it is, of course, just this fact which renders anything like a complete account of them impossible in a book of modest size. There is scarcely a constitutional experiment known to modern practice (except, perhaps, the Russian Soviet) which is not to be found in one or other of the Constitutions of the Empire. In view of existing circumstances and aspirations, it is interesting to note that, in Dr. Jennings's view, even a Republic might easily find a place among them; for, in that view, a Republic is "not a form of government, but merely a method of electing a titular head" (p. 25). Dr. Jennings also points out that the old division of colonies into settled (or ceded) and conquered colonies has been rendered largely obsolete by the use made of the British Settlements Act, 1887. Nevertheless, as he freely admits, the fact that in colonies of the first class the settlers retain, *primâ facie*, the law of their Mother Country, while in the second the law existing at the time of conquest remains until altered by the conquerors, does produce great practical differences.

On one extremely important point, all too briefly discussed in Dr. Jennings's essay on the Dominion Constitution of Canada, we should have liked to have more. The writer is contrasting the methods by which the Constitution of the United States and those of the Empire are interpreted by the Courts. Whereas, in the U.S.A., the Supreme Court is dealing with a sacrosanct document, intended by its authors to last for all time, in the case of the British Courts they are (or may be) dealing with documents of no overwhelming sanctity or permanence, as to which the attitude of their framers is, more or less, that of the candidate for parliamentary honours who, in addressing his constituents, is reported to have said: "These are my opinions, but if they do not suit you, they can be altered." But we are not sure that we agree with Dr. Jennings in the conclusion which he draws from this difference, *viz.* that while the British Courts interpret rather strictly and verbally the provisions of constitutional statutes, the Supreme Court "uses a dynamic or progressive method of interpretation" (p. 135). No doubt recent events in America have suggested a changed attitude on the part of the Supreme Court; but until quite recently the tendency seems to have been the other way. And we fancy that, even now, there are still on the Supreme Court Bench men who would repudiate the view that the Constitution of the United States "has to be interpreted not according to the intention of its framers but according to the conditions which it has to meet." But this subject is too large to be discussed in a review. EDWARD JENKS.

THE LEGAL POSITION OF WAR.

THE title of this useful monograph[1] is perhaps too wide, inasmuch as it does not actually deal with the practice of war except in so far as it bears on the distinction between just and unjust wars. The bulk of the book is devoted to a straightforward, although necessarily compressed, summary of the views held on the question of the place of war by representative thinkers—like Plato, Aristotle, Cicero, St. Augustine, St. Thomas Aquinas, Machiavelli, Luther, Erasmus, Bacon—and international lawyers beginning with Victoria, Ayala, Suarez and Gentili and ending with Bynkershoek, Moser, de Martens, Wolff and Vattel. The concluding chapter is interesting and goes beyond a mere summary.

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[1] Ballis, *The Legal Position of War: Changes in its Practice and Theory from Plato to Vattel.* (The Hague: Nijhoff, 1937.) Pp. 188. 4 glds.

The author's account of the views of the various writers is clear and accurate. But it is not certain that he is right in accepting the commonly held opinion that Bynkershoek disregarded altogether the distinction between just and unjust wars in connexion with neutrality. Actually, Bynkershoek admits that that distinction is of value in cases where there is a previous treaty promising assistance ; there is then room, he says, for differentiating between the aggressor and the attacked State. It might also have been of interest to inquire how far, if at all, the Biblical distinction between wars of command and permitted wars influenced the classical distinction between just and unjust wars. It is of some interest that St. Augustine was not only the first to lay stress on the distinction between just and unjust wars in the modern sense, but that he did so by reference to the Biblical conception of wars of command. H. L.

THE PRIVATE INTERNATIONAL LAW OF SWITZERLAND.

A HANDBOOK on the conflict of laws on the basis of Swiss law has for a long time been felt to be a desideratum, and especially so during recent years. The political changes in Central Europe have not been able to shake the stability of the Swiss democratic federation, and as a result the importance of Switzerland as a centre for international legal relations has considerably increased. On the other hand, the influence of Switzerland's immediate neighbours on the formation and development of Swiss law, which for a certain time has been very great, although it was never overwhelming, has diminished and has given room to the furthering of legal ideas which are anything but identical to those in vogue in those other Continental countries which are bordering on Swiss territory. Useful as the references to Swiss law in Dr. Nussbaum's admirable handbook on the German law of conflict of laws undoubtedly were, the need for a modern Swiss treatise could not be denied. It is gratifying to see that the gap has now been filled.

Dr. Schnitzer has written a thoroughly sound and attractive book.[1] Between the Scylla of flying up into the region of " pure " theory and the Charybdis of sticking to a mere copying of precedents he has managed to steer a reasonable middle course, which has enabled him to build up a logical system without losing sight of practical necessities. His book contains somewhat more than its title promises in that it gives in addition to the rules of private international law proper a brief survey of some rules relating to the conflict of laws of procedure which in most Continental treatises are not included. Another very welcome addition is a reprint of the more important Swiss statutes and those international treaties to which Switzerland is a party.

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[1] *Handbuch des Internationalen Privatrechts unter besonderer Berücksichtigung der schweizerischen Gesetzgebung und Rechtssprechung.* By Dr. Jur. Adolf F. Schnitzer. (Zurich : Verlag für Recht und Gesellschaft A.G.) Pp. xvi + 415.

The Swiss law of conflict of laws is in one respect an exception among Continental private international laws: it has not been influenced by that nationalistic tendency which in nearly all other Continental countries has led to the principle of domicile having been superseded by the principle of nationality. Swiss law with its happy mixture of sturdy conservatism and progressive common sense has refused to follow the inducements of the Mazzini school, and so Swiss law of conflict of laws remains governed by the principle of domicile. But the Swiss conception of domicile differs much from the complex doctrine which holds sway in the Anglo-Saxon countries. With a simplicity worthy of both admiration and envy, Swiss law defines " domicile " as the place where a person resides with the intention of staying permanently. The statutory rules relating to domicile fill only one page and all the comment on the problem of domicile which Dr. Schnitzer has to offer is condensed into six pages.

Another part of the book which deserves close attention is the chapter on problems of currency law. Swiss courts have taken a leading position in the Continental dispute with regard to the recognition of foreign currency restrictions. Without exception they have taken the view that no such recognition can be given to such foreign currency laws as result in a " spoliative interference " with well-acquired rights of Swiss or foreign creditors, because that would be a violation of the Swiss public order. They have stated that laws forbidding the export of money from a foreign country and thereby impairing the right of the creditor to be paid the full value of his claim are " political laws " and therefore inapplicable outside the country which has issued them. In one case the debtor put forward a plea similar to that of *de Beéche* v. *South American Stores* and *St. Pierre* v. *South American Stores*, namely that currency legislation of a foreign country had made performance by him impossible. But the Commercial Court of Zürich refused to accept this plea because an obligation to pay money could never become really impossible, especially not in a case where the debtor holds property outside the country whose currency laws are alleged to prevent payment. It is greatly to be regretted that the English courts in the two just mentioned cases were not given an opportunity to compare their point of view with that of the Swiss Courts, which have had so frequently an occasion to deal with this important problem.

Occasionally one has the feeling that Dr. Schnitzer might have given more attention to questions of detail and added to his material of judicial decisions so as to make his book a complete " handbook," not a mere textbook for study and introduction. In a new edition more space might be given to commercial law, particularly to the law of bills of exchange, including cheques. The new provisions of the Swiss Law of Obligations of 1937 have not yet been incorporated into the book. But it is surely a compliment for a reader to say of a book that he wishes there were more for him to read.

E. J. COHN.

PRIVATE INTERNATIONAL LAW OF SUCCESSION.

THE problems relating to succession are among the most difficult in Private International Law, and they are also among the most important from the practitioner's point of view. A comparative study[1] of the manner in which these problems are determined by German and Anglo-American Private International Law should, therefore, be of considerable practical value as well as of academic interest. The author, a German lawyer by training, and a former member of the Bar of the Court of Appeal in Berlin, has acquired a thorough mastery of the English law of succession and its rules of conflict of laws on the subject, and is, therefore, well qualified to undertake this difficult task.

It would not be possible in a work of this size to consider in detail the position in the various States of the U.S.A., where the common law rules have been superseded or modified by particular legislation, and Dr. Breslauer has contented himself for the greater part with a general statement of the American common law as it is expounded in the standard American works on the Conflict of Laws. This, however, does not seriously affect the main purpose of the work, which is to compare the German and the Anglo-American solutions, rather than to examine in detail the minor differences within the common law system.

The fact that on the Continent the task of dealing with the assets is usually entrusted to the " heir " without the interposition of a person corresponding to the English personal representative is apt to give rise to the problem of classification, which is considered in Chapter II. The author concludes that in spite of what the jurists may advocate, the courts generally classify according to the *lex fori*, and this, no doubt, accounts for the fact that this problem, which so bewilders the writers on Private International Law, little perturbs the judges.

The controversial problem of renvoi, which has figured very prominently in relation to succession, is then briefly considered. Dr. Breslauer, contrary to the modern Oxford doctrine, maintains that " under English Law there is now a settled practice " that the English courts should administer the appropriate foreign law as it is administered by the courts of the foreign country itself.

Having disposed of the preliminary problems, the author deals with his subject under the following main heads: I. Intestate Succession. II. Testamentary Succession. III. Administration. With the exception of Death Duties, which constitute too intricate a subject to be adequately treated in the brief space allotted to it at the end, the whole of this wide and difficult field is covered with remarkable thoroughness, and in a highly practical manner.

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[1] *The Private International Law of Succession in England, America and Germany.* By Walter Breslauer, Dr. Jur. (London: Sweet & Maxwell, Ltd., 1937.) Pp. xxviii + 339. £1 1s.

No treatise on this subject could be expected to make easy reading, but although the language is apt to be somewhat stiff and obscure in places, the author has on the whole successfully overcome the great difficulty of expressing in the idiom of English law the ideas of another system. It is, therefore, unfortunate that the book has not been more attractively printed and that neither the paper nor the binding is worthy of the book itself. D. J. LLEWELYN DAVIES.

CRIMINAL PROCEDURE.

THIS book [1] is probably the most outstanding contribution to the history of European Criminal Procedure that has been published since the War. It is worthy of a far more comprehensive discussion than the competence of the present reviewer and the space at his disposal allow. The first volume covers the story up to the year 1135, whilst the second volume will carry it into the Year Book period. The third volume will be devoted to the changes effected under the Tudors, especially to the effect of Star Chamber theories and practice.

It is impossible even to indicate here the overwhelming richness of new aspects which the author has presented in the present volume. Whilst the first five chapters deal with the early Continental developments, the sixth and last chapter is devoted to Anglo-Saxon and Norman law. The Peace Theory, Outlawry, Composition, Immunity and Feud are among the institutions discussed. Brunner's theory of outlawry, this "magnificently systematic picture," comes up for searching criticism. Though accepting Brunner's basic view of the Frankish pedigree of the English jury system, the author repudiates Brunner's conception of a "cultural unity of all Germanic peoples" and of an "all-pervading undifferentiated Germanic Volksgeist," which enabled the German historian to use indiscriminately Lombard, Visigothic as well as much later Scandinavian sources to fill out "bare spots" in Frankish law. "Chronology hindered the jurists of this method but little."

Of great interest are also the author's remarks on the decay of the Composition System as a result of the economic deterioration in the 10th and 11th centuries. H. M.

THE WORLD CRISIS.

THE Graduate Institute of International Studies at Geneva, under the able guidance of MM. Mantoux and Rappard, has now won for itself a world-wide reputation. The present volume,[1] issued to commemorate the tenth anniversary of the Institute, consists of thirteen essays by various members of the teaching staff. It is divided into three sections, dealing respectively with political and historical problems, legal problems and economic problems.

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[1] *Felony and Misdemeanor : A Study in the History of English Criminal Procedure.* By Julius Goebel, Jr., Professor of Law, Columbia University. Vol. I. Publications of the Foundation for Research in Legal History, Columbia University Schoo of Law, edited by Julius Goebel, Jr. (New York : the Commonwealth Fund. London: Sir Humphrey Milford, Oxford University Press, 1937.) Pp. xxix + 455. 21*s*.

The limits of a short notice do not permit even an adequate summary of the topics discussed in these essays. Professor Mantoux begins by giving an excellent historical monograph upon the failure of the League to deal with the Vilna dispute of 1920. Professor Rappard follows with a judicious appreciation of the influence of the League upon international society after due allowance has been made for all its failures and shortcomings. Among the other essays in the first section particular interest attaches to Signor Ferrero's analysis of the difference between the normal type of war, with its limited objectives, and the wars which are " retrospectively justified," such as the Napoleonic Wars and the Great War.

In the legal section M. Kaeckenbeeck contributes an admirable account of one of the most successful experiments in international co-operation—the Arbitral Tribunal of Upper Silesia, which functioned harmoniously under his own presidency for fifteen years. Dr. Hans Wehberg discusses the problem of civil war in its most recent developments, and urges that the law of nations should concern itself more actively with this subject. The other two legal essays discuss the problem of League reform, but the course of events since they were written seems to have relegated this question to the background.

The four essays on economic problems are marked by a note of pessimism. All the authors emphasize its fundamental truth that an improvement in world economics can only be the consequence, not the cause, of a renewed spirit of goodwill among the nations.

The essays which have been written in French or German are presented to English readers in acceptable translations, and a French edition is published at Zürich. A complete bibliography of the publication of the Institute forms a useful appendix to the volume. H. A. S.

WORLD GOVERNMENT.

It is convenient to review these two books[2] together, as they are written by the same author and as the first incorporates to a large extent the principal ideas of the second. They may, it is believed, be fittingly noticed in this *Journal*, for, although written by one who is not a lawyer and whose views on legal topics cannot always be unreservedly accepted, their main theme is of paramount importance for international law. It is the problem of world government and of the rule of law among nations through the establishment of a World State. Señor Madariaga had a distinguished academic career as Professor of Spanish Literature at the University of Oxford, and there ought to be no doubts about his qualifications to put this international subject before the English-speaking student. He was for a long time one of the leading members of the Secretariat of the League. After the advent of the Spanish Republic, he represented his country on the Council of the League and took a prominent part in the settlement or attempted settlement of several disputes, including the Italo-Abyssinian dispute. *The World's Design* may therefore be regarded as the international political philosophy of one particularly well qualified to speak on the subject.

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[1] *The World Crisis.* By various writers. (London: Longmans, Green & Co., 1938.) Pp. xii + 385.

[2] *The World's Design.* By Salvador de Madariaga. (London: George Allen & Unwin, Ltd., 1938.) Pp. xx + 291. 10*s.* 6*d.*

Theory and Practice in International Relations. By Salvador de Madariaga. (London: Oxford University Press. 1937.) Pp. 105. 6*s.*

Señor Madariaga's main thesis is that in a world of apparent chaos and anarchy the international community and international solidarity are a fact, and that the task of the immediate future is to make that reality of international unity and interdependence part of the individual and collective consciousness of peoples. The chapters showing the extent of that unity are written with a cogency and eloquence which the student will find suggestive and the general reader inspiring. The theme is developed with a conviction and assurance which some will find bordering on exaggeration—for instance, when the author insists that in fact questions of armaments and tariffs have ceased to be matters subject to exclusive national control and that the latter is a secondary phenomenon following and dependent upon the more comprehensive international reality. The author would probably—and, it is believed, accurately—reply that the tangible and ever-present reality of that secondary phenomenon is contrary to reason, to morals, to economic laws, to the trend of science and, in particular, to the rational idea of progress, which he conceives as " the rise towards the awareness of the unity of mankind." The ultimate reality of that progress is for the author a matter both of faith and of scientific conviction, and he can therefore afford to treat the present stage of international relations as a temporary phase. The permanent element in the political history of mankind is the evolution to a World State of which the League of Nations —not necessarily the present League, but probably and preferably the present League—is the most promising starting-point. The two books, therefore, are not in any way a defeatist pronouncement in a period of general discouragement. On the contrary, Señor Madariaga puts forward definite proposals for making the League more effective and more international. These include not only schemes for disarmament and for internationalization of colonies under a League régime. He is concerned with such details as the transference to Geneva of the Committee for Intellectual Co-operation and of the Bank for International Settlements ; and he even criticizes " the objectionable and undignified habit of smoking at meetings of the Commissions and of the Council." The reviewer knows of no book in the post-war period in which the fundamental ideas of the international commonwealth as embodied in the League have been treated more completely, more eloquently and more persuasively. They are a contribution of abiding value to the philosophy of international government and the theory of international relations. With regard to the latter, there may be mentioned the author's view that co-operation of sovereign States in the international sphere, far from reducing the general standard of conduct to the level of the most obstinate and the least progressive State, has the result of raising that conduct by making them agree on the higher plane of reason. A crowd, he says, composed of the members of the same nation tends to be moved and to agree on the lower plane of passions. Persons belonging to different nations cannot agree on that plane (*Theory and Practice in International Relations*, p. 97).

It is almost unavoidable that these two books, being in the nature of a confession of faith and having a thesis to prove, should lend themselves to criticism in many ways. The argument is often dialectical to the point of being paradoxical (it was unnecessary, perhaps, to invoke, on p. 20, Signor Mussolini or Herr Hitler as indirect evidence of the universality of the League and to support the argument by the further assertion that it is only because a man is a Christian that he may be deemed to have violated one of the Ten Commandments). Señor Madariaga is a writer of unusual facility and picturesqueness of style, and he makes full use of his gifts. But at times the reader has the impression that the dignity of the subject is being sacrificed to a verbal nicety. On occasions, even the verbal nicety is not brought to its logical conclusion. Thus, on p. 122, the author agrees with the pessimists who say that there is no international law; he does so on the ground that its present rules do not flow from the consciousness of an inherent necessity of the world community, as is shown by the failure to uphold the law challenged by one of them (a somewhat disturbing argument, seeing that the author disapproves of sanctions in principle). But on the same page he admits that international law exists, that it is a passing phase and that its continuance is undesirable, seeing that being merely *inter-national* (and not super-national) it perpetuates the idea of national sovereignty. In general, although his analysis of some crucial articles of the Covenant, and especially of the rule of unanimity, is correct and illuminating, the author is not at his best in his treatment of international law. He fails to see that for the lawyer law is not an expression of actual behaviour, but a rule of right conduct whose validity is unaffected by its observance.

But these are blemishes which may be forgiven to one who is not a lawyer. The only serious flaw in the continuity of the author's exposition lies in his attitude to sanctions. Whether the rule of law above States be called inter-national or supra-national, its enforcement by external means is of the essence of a world law—as, indeed, of all law. But Señor Madariaga is against the whole principle of sanctions—and this for reasons which carry little conviction. They are, he says (on p. 184), against "the laws of nature." Sanctions are punishment; but as it is impossible to punish a limb without inflicting punishment on the body as a whole, so it is impossible to punish a State without punishing the world community. It may be doubted whether the author would be prepared to press this reasoning. In fact, he adduces alternative although less fundamental arguments against sanctions. One of them is that it is undesirable to have sanctions in order to protect a State against aggression so long as we are not certain that its policy has not provoked the aggression. The second is that sanctions ought in their nature to be co-operative, while in fact the Council of the League has developed the practice of conducting major issues of policy through the Great Powers. The third, and obviously inconsistent, argument is that sanctions signify war and that war can never be a co-operative action. The reviewer is inclined to believe that the author's real objection to sanctions is that they may be at present the most important obstacle in the way of the universality of the League. This, undoubtedly, may according to some be a weighty objection to sanctions in the present stage of international relations. But it is undesirable to invoke reasons of principle in support of what is clearly well-meant and, possibly, justifiable political opportunism.

It is to be hoped that *The World's Design* will secure for itself in the literature of international relations the permanent place to which it is entitled as an expression of the views of an enlightened and experienced *civis mundi* in the best meaning of that term. H. L.

CASES ON INTERNATIONAL LAW.

THERE has been in recent years an abundance of Case Books published in the United States.[1] But it must be said with regard to practically all of them that, far from supplying an example of unnecessary book making, they testify in an encouraging manner to the vitality of the subject in the United States and to the energy and competence displayed in the teaching of it. When the time comes for the production of an up-to-date Case Book on International Law on modern lines in this country, it is to be assumed that its author will find the cumulative experience of his American colleagues of considerable assistance.

The present volume,[2] prepared by Dr. James Brown Scott and Professor Walther Jaeger, of the University of Georgetown, introduces welcome innovations, mainly in two respects. In the first instance it includes an imposing percentage of cases decided by municipal courts of countries other than Great Britain and the United States. These cases are either printed in full or reproduced from the *Annual Digest of Public International Law Cases*. This, it is believed, is a proper innovation in a Case Book on International Law. If, as it is to be hoped, it will be used by the practising branch of the profession, it may influence courts to rely not only on the precedents, often scarce, of their own country, but also on those of other nations. This has to some extent been the case in English and American judicial practice—witness, for instance, the recent decision of the House of Lords in the *Cristina*[1] with regard to the jurisdictional immunities of State-owned ships engaged in commerce—but it is highly desirable that the circle of reciprocal influence should be extended to cover other countries. The second innovation consists in so-called problem notes. These are appended to each chapter. They embody a short statement of the facts underlying a case actually decided by an American court. The student is asked to give a reasoned decision of his own. These notes, although numerous and frequent, occupy little space and clearly enhance the value of the book.

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[1] For a critical survey of these publications see the learned article by Judge Hudson in the *American Journal of International Law*, xxxii (1938), pp. 447–56.

[2] *Cases on International Law.* By J. B. Scott and W. H. E. Jaeger. (St. Paul, Minn.: West Publishing Company.) Second edition, 1937. Pp. lxix + 1062. $5.50.

The volume covers the law both of peace and of war. To the latter the authors have devoted more than three hundred pages, and they seem to have covered in them most of the essential cases—although one would have wished to find a verbatim report of the *Leonora* and, especially, of the *Kim*. International Disputes are treated in a separate Part under the designation of Procedural Law. The arrangement of that section is controversial, as it now includes large portions of substantive law relating to State responsibility, damages and prescription. These might usefully have been dealt with separately, leaving more space for illustration, by reference to decided cases, of the procedure of arbitration and judicial settlement. With regard to the general question of selection of the cases, there are only two minor criticisms which occur to the reviewer : In a number of cases which the editors have reproduced from the *Annual Digest* the decisions do not seem to be of sufficient generality or importance to warrant inclusion in a case book, although they may be essential in the *Annual Digest* for the sake of completeness and as a guide for specialized study. Secondly, the volume includes a number of decisions which are not particularly instructive unless accompanied by an explanatory editorial note. Thus, for instance, the important but laconic award in the Behring Sea Arbitration might usefully have been supplemented by some such commentary.

The volume opens with a Declaration of the Rights and Duties of Nations adopted in 1916 by the American Institute of International Law and a Declaration of the International Rights of Man adopted by the Institute of International Law in 1929. The practice of States has not been in accordance with these Declarations, but they need not on that account be regarded as being unrelated to or outside international law. The insertion of the Declarations is indicative of the spirit in which this excellent Case Book has been prepared. It concludes with a reprint of the full text of the Covenant of the League—accompanied, it must be added, by the full text of the United States Neutrality Statute of 1937.

H. L.

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[1] [1938] A.C. 485 ; (1938) 107 L.J.P. 1.

We have also to acknowledge[1]:

Handbook of Latin American Studies, 1936. Ed. by Lewis Hanke. (London: Sir Humphrey Milford.) Pp. xv + 515. 17*s.*

Canada and the Law of Nations. Ed. by Prof. Norman Mackenzie and Lionel H. Laing. (London: Sir Humphrey Milford.) Pp. xxvii + 567. 27*s.*

Colonial Blockade and Neutral Rights 1739–1763. By Richard Pares. (London: Sir Humphrey Milford.) Pp. 323. 21*s.*

The Colonial Empire and its Civil Service. By Charles J. Jeffries. (London: Cambridge University Press.) Pp. xxv + 259. 10*s.* 6*d.*

Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth. By Horace Emerson Read. (London: Sir Humphrey Milford.) Pp. xiv + 371. 17*s.*

International Survey of Legal Decisions on Labour Law, 1936–7. (London: International Labour Office, League of Nations.) Pp. lviii + 533. 10*s.*

The Law of Treaties: British Practice and Opinions. By Arnold D. McNair. (London: Sir Humphrey Milford.) Pp. xxix + 578. 30*s.*

Administrative Law in Madras. By H. Chandrasekharan. (Madras: Madras Law Journal Office.) Pp. vii + 106. Rs. 2.

City Government. The Johannesburg Experiment. By John P. R. Maud. (London: Sir Humphrey Milford.) Pp. xiv + 412. 21*s.*

La Portée des Qualifications en Droit international privé. By Dr. Henri Meierhof. (Paris: Les Editions Domat-Montchrestien.) Pp. 237.

Justice—Droit—Etat. By Georges Del Vecchio. (Paris: Recueil Sirey.) Pp. xxxi + 387. Frs. 75.

Le Conflit des Lois en matière de contrats dans le Droit des Etats-Unis d'Amérique et le Droit anglais comparés au Droit français. By Jean-P. Barbey. (Paris: Rousseau & Cie.) Pp. xix + 359. Frs. 60.

La crise de la démocratie et le renforcement du pouvoir exécutif. By Emile Giraud. (Paris: Recueil Sirey.) Pp. 184. Frs. 40.

La Guerre Aérienne. By Dr. Erik Castren. (Helsingfors: Akademiska Bokhandeln.) Pp. 41.

La Réorganisation des sociétés insolvables aux Etats-Unis. By Charley del Marmol. (Paris: Recueil Sirey.) Pp. xv + 316. Frs. 75.

Grundfragen der Rechtsauffassung. By Drs. R. Höhn, T. Maunz and E. Swoboda. (Munich: Duncker & Humblot.) Pp. 116. RM. 6.

Anwendung fremden Rechts. By Fritz Ren. (Berlin: Junker & Dünnhaupt.) Pp. iv + 114. RM. 3.50.

Die Billigkeit im Recht. By Dr. Werner Gramsch. (Stuttgart: Deutschen Verlags-Anstalt.) Pp. 84. RM. 3.60.

Konzerne und Kartelle im Zeichen der "Wirtschaftslenkung." By Dr. Fritz Haussmann. (Zurich: Verlag für Recht und Gessellschaft A.-G.) Pp. vii + 382.

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[1] Mention here does not preclude a review later.

Das Versäumnisverfahren im Zivilprozess der wichtigsten ausserdeutschen Kulturstaaten Europas. By Dr. Hans Steuerwald. (Berlin: Carl Heymanns Verlag.) Pp. viii + 172. RM. 10.

Die Schuldhaftung in Schadenersatzrecht and *Zur Erneuerung des Schadenersatzrechtes.* By Dr. Albert A. Ehrenzweig. (Vienna: Manzsche Verlags.) Pp. xxiv + 279 and pp. 59.

I Marchi di Fabbrica e di Commercia nel Diritto Internazionale Privato. By Angelo Pieri Sereni. (Milan: Dott. A. Giuffre-Editore.) Pp. xi + 208. Lire 25.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; The Arbitration Journal; Bombay Law Journal; Bombay Law Reporter; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin mensuel de la Société de Législation Comparée; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Headway; Hindustan Review; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal de Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Revista de Ciencia Juridicas y Sociales; Revista de Identification y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; South African Law Journal; Studi di Diritto Industriale; Tulane Law Review; Wisconsin Law Review; Zeitschrift für Osteuropäisches Recht; Zeitschrift für die gesamte Strafrechtswissenschaft.